No. 89-1958

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

AMERICAN POSTAL WORKERS UNION, AFL-CIO,
Petitioner,

v.

UNITED STATES POSTAL SERVICE,

and

NATIONAL POST OFFICE MAIL HANDLERS, WATCHMEN AND GROUP LEADERS DIVISION OF THE LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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June 13, 1990

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, gives the federal courts the power to create a generalized federal common law of labor relations which may be employed to override the agreement of the parties as interpreted by an arbitrator and to compel those parties to accept an arbitration procedure to which they have not agreed, but which comports with the court's notions of economy and efficiency.

2. Whether, in particular, Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, gives the federal courts the power to compel tripartite arbitration of a jurisdictional dispute between an employer and two unions, where an arbitrator has already interpreted the relevant collective bargaining agreement as permitting only bilateral arbitration and, for that reason, has refused to permit intervention by a union which is not a party to the agreement.*

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* The appellant in the court of appeals, now petitioner in this Court, was the American Postal Workers Union, AFL-CIO. The appellees in the court below, now respondents in this Court, were the United States Postal Service and National Post Office Mail Handlers, Watchmen and Group Leaders Division of the Laborers' International Union of North America, AFL-CIO.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The American Postal Workers Union petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review the decision and judgment in *United States Postal Service v. American Postal Workers Union*, 893 F.2d 1117 (9th Cir. 1990).

OPINIONS BELOW

The opinion of the court of appeals is reported at 893 F.2d 1117 and is reprinted in the appendix to this pe-

tition at 1a-11a.[1] The order of the court of appeals denying rehearing is unreported and is reprinted at Pet. App. 12a. The opinion on cross-motions for summary judgment of the District Court for the Northern District of California is unreported and is reprinted at Pet. App. 13a-17a.

JURISDICTION

The court of appeals' judgment was entered on January 12, 1990, and its order denying rehearing was entered on March 15, 1990. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1). The district court had jurisdiction pursuant to 39 U.S.C. §§ 409 and 1208, and 28 U.S.C. §§ 1331 and 1337. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291.

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are reprinted at Pet. App. 18a-27a.

STATEMENT OF THE CASE

1. *Facts.* Petitioner in this case, the American Postal Workers Union, AFL-CIO ("Petitioner" or "APWU"), is a labor organization representing employees or respondent United States Postal Service ("Postal Service") for purposes of collective bargaining. Other employees of the Postal Service in separate bargaining units are represented for purposes of collective bargaining by other labor organizations, including respondent National Post Office Mail Handlers, Watchmen and Group Leaders Division of the Laborers' International Union of North America, AFL-CIO ("Mail Handlers"). Pet. App. 2a; E.R. 22.

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[1] Citations to the Petitioner's Appendix shall be denominated as "Pet. App. —." Citations to documents contained in the Excerpt of Record filed in the court of appeal shall be denominated "E.R. —." Citations to documents contained in the Clerk's Record in the district court shall be denominated at "C.R. —."

Prior to 1981, the APWU and the Mail Handlers engaged in joint collective bargaining negotiations with the Postal Service and were signatory to a single collective bargaining agreement. Pet. App. 2a; E.R. 22. That single agreement included a provision granting to each union the right to intervene in arbitration proceedings initiated by the other union:

> In any arbitration proceeding in which a union feels that its interest may be affected, it shall be entitled to intervene and participate in such arbitration proceeding, but it shall be required to share the cost of such arbitration equally with any or all other union parties to such proceeding.

E.R. 36. 41.

In 1981, the Mail Handlers chose to withdraw from joint bargaining with the APWU, and instead to bargain separately with the Postal Service. Pet. App. 2a; E.R. 22, 24-25. The Postal Service thereafter entered into separate collective bargaining agreements with the APWU and the Mail Handlers for the periods 1981-1984, 1984-1987 and 1987-1990. E.R. 24-26. Although these separate collective bargaining agreements are similar in many respects, and although each contains an arbitration provision covering *inter alia* jurisdictional disputes, neither the APWU agreement nor the Mail Handlers agreement contains a provision permitting the other union to participate in its arbitration procedure. Pet. App. 3a; E.R. 24.[2]

In June 1985, the APWU filed a grievance under the dispute resolution procedures of its collective bargaining agreement, alleging that certain work performed by

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[2] Although the Postal Service could have sought a provision establishing tripartite arbitration of jurisdictional disputes in the 1981, 1984 and 1987 collective bargaining negotiations, it chose not to make such a collective bargaining proposal to the APWU. E.R. 29-30.

postal employees at the San Francisco Airport Mail Facility had been improperly assigned by the Postal Service to employees represented by the Mail Handlers, rather than to employees represented by the APWU, in violation of the APWU agreement and Regional Instruction 399.[3] The APWU's grievance was not resolved by the grievance procedure and was appealed to bipartite arbitration between the APWU and the Postal Service under their collective bargaining agreement. Pet. App. 3a.

Prior to the arbitration hearing, the Mail Handlers petitioned to intervene in the arbitration between the APWU and the Postal Service. Pet. App. 3a. E.R. 2. The Postal Service supported the Mail Handler's motion to intervene, and the APWU opposed that motion. E.R. 2. The parties agreed, however, to brief the issue and submit it to the arbitrator, for a decision prior to arbitration proceedings on the merits. E.R. 2.

On August 28, 1987, the arbitrator denied the Mail Handlers' motion to intervene, holding that "there is no agreed-upon mechanism for resolving this dispute by allowing the Mail Handlers to intervene" (E.R. 3) and that "the contract under which this dispute is being arbitrated simply does not authorize" tripartite arbitration (E.R. 10). *See also* Pet. App. 3a. The arbitrator also rejected the Postal Service's and the Mail Handlers' argument that past practice under the contract (in which the APWU had occasionally voluntarily agreed to tripartite arbitration on a case-by-case basis) "established a past practice which is binding on the parties." E.R. 10. The arbitrator therefore concluded that "this matter will proceed as a bilateral arbitration between the Postal Service and the APWU." E.R. 10.

2. *Proceedings Below.* On April 12, 1988, the Postal Service filed suit in federal district court against the

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[3] Regional Instruction 399 is a set of work assignment guidelines to which the Postal Service, the APWU and the Mail Handlers are bound. E.R. 14.

APWU and the Mail Handlers, seeking a declaratory judgment and an order compelling tripartite arbitration of the dispute. Pet. App. 3a. The APWU Answer asserted a counterclaim against the Postal Service seeking to compel bipartite arbitration and an affirmative defense that the Postal Service's Complaint was barred by California's 100-day statute of limitations applicable to suits to set aside arbitrator's awards. Pet. App. 10a; C.R. 7. The Mail Handlers asserted crossclaims and counterclaims in its Answer seeking tripartite arbitration and a permanent injunction covering any future jurisdictional disputes. Pet. App. 3a.

All three parties filed cross-motions for summary judgment. Prior to the filing of the APWU's reply brief on its own motion and its opposition to the Mail Handlers' motion were not due until August 18, 1988, the district court issued its order and judgment on the cross-motions for summary judgment on August 5, 1988, granting the Postal Service's motion for an order compelling tripartite arbitration. Pet. App. 3a; R. 148-155.[4]

On appeal, the Ninth Circuit affirmed the judgment of the district court. Pet. App. 11a. Although the court of appeals recognized that "a court can only compel arbitration pursuant to the parties' contract" (Pet. App. 5a), the court held that there was a sufficient "contractual nexus" between the parties to support the district court's power to order tripartite arbitration (Pet. App. 6a) despite the uncontested fact that the APWU agreement does *not* permit tripartite arbitration. Pet. App. 2a-3a.

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[4] The district court's August 5, 1988 Order also denied the Mail Handlers' motion for a permanent injunction. Pet. App. 18a; E.R. 152-153, 155. On August 30, 1988, the district court amended its August 5 Order to reflect that it had also denied the APWU's motion for summary judgment. Pet. App. 19a; E.R. 156-157.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' TRIPARTITE ARBITRATION DECISION IS BASED ON A FUNDAMENTAL MISUNDERSTANDING OF THIS COURT'S CASES PERMITTING FEDERAL COURTS TO CREATE A FEDERAL COMMON LAW UNDER § 301, AND AS SUCH RAISES A CRITICAL ISSUE OF NATIONAL LABOR POLICY.

The Ninth Circuit decided in this case that a federal court has the power, under court-created federal common law, to *absolve* an employer of the obligation to arbitrate under contractually-established bipartite procedures, and instead to require a union, in this case the APWU, to: (a) participate in a tripartite arbitration proceeding, a format to which it has not agreed; (b) arbitrate with a party—another union—with which it has no contract and no dispute resolution mechanism; (c) arbitrate concerning, in part, a collective bargaining agreement—that between the employer and the other union—to which the APWU is not bound; and (d) do so in an arbitration proceeding in which the arbitrator has already ruled that the APWU's agreement does not provide for such a tripartite arbitration procedure.

In justifying its result, the Ninth Circuit invoked the authority of federal courts to fashion federal common law under § 301 of the Labor-Management Relations Act. Pet. App. 5a. But that authority has always been understood by this Court and, with the sole exception of other cases ordering tripartite arbitration (*see* pp. 20-21, *infra*), by the lower federal courts as conferring authority on the federal courts to interpret and apply, not supervene, the parties' labor agreements. The courts' unfortunate decision to *override* the parties' agreement in the name of a free-floating federal common law of labor relations, like several other lower courts decisions in the same vein, departs diametrically from federal labor policy as interpreted by numerous decisions of this

Court, and runs counter to other lines of lower court decisions in suits to compel arbitration or review arbitrators' awards.

As this Court has repeatedly stressed, federal labor policy strives to encourage free collective bargaining and, to that end, *prohibits* federal courts and agencies from dictating the terms of agreement between private parties or modifying the terms of agreement reached through collective bargaining. *See, e.g., United Steelworkers v. Rawson*, —— U.S. ——, 58 U.S.L.W. 4556, 4559 (1990); *United Mine Workers Health & Retirement Funds v. Robinson*, 455 U.S. 562, 576 (1982); *Carbon Fuel Co. v. United Mine Workers*, 444 U.S. 212 (1979); *NLRB v. Burns International Security Services*, 496 U.S. 272, 283, 287 (1972); *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970). While federal labor policy favors the *voluntary* settlement of industrial disputes through arbitration, that policy is violated, not served, by *compulsion* upon private parties to submit their disputes to an arbitration forum other than the one established by a collective bargaining agreement to which they are bound. *See, e.g., AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643 (1986); *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 374 (1974); *N.L.R.B. v. Plasterers' Local Union No. 79*, 404 U.S. 116 (1971); *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261 (1964); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960); *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960). Thus, the opinion below is not merely incorrect but threatens to undermine the central pillar of federal labor policy—the principle that industrial peace can be achieved only through the encouragement of voluntary, enforceable agreements reached through free collective bargaining.

1. *Federal Common Law and Federal Labor Policy.* (a) In a series of decisions beginning with *Textile*

Workers Union v. Lincoln Mills, 353 U.S. 448 (1957), this Court has articulated the functions and delineated the authority of the federal courts in adjudicating cases arising under § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, and other similar statutes which give the federal courts jurisdiction over actions for violation of collective bargaining agreements.[5] In *Lincoln Mills*, the Court held that § 301 was not merely jurisdictional, but rather was a source of judicial authority to declare substantive federal common law. *Id.* at 451-57.

As early as *Lincoln Mills*, however, this Court made clear that the federal common law available under § 301 is not a generalized federal common law of labor relations, but rather a federal common law of labor *contracts;* the purpose of this common law is to permit labor agreements to be *enforced*, especially their arbitration provisions:

> § 301(a) . . . authorizes federal courts to fashion a body of federal law for the *enforcement* of these col-

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[5] The Postal Reorganization Act of 1971, 39 U.S.C. §§ 101 *et seq.*, gives postal employees the right to engage in collective bargaining regarding wages, hours and conditions of employment, and establishes the jurisdiction of the National Labor Relations Board ("NLRB") over the Postal Service. *See* 39 U.S.C. §§ 1201 *et seq.* Although postal employees are prohibited from striking, collective bargaining relationships between the Postal Service and its employees are, in all respects relevant to this case, the same as in the private sector. *See id.* Like LMRA § 301, 39 U.S.C. § 1208(b) grants federal district courts jurisdiction over suits for violation of agreements between the Postal Service and the unions representing its employees, and 39 U.S.C. § 1209 provides that consistent provisions of the LMRA, 29 U.S.C. §§ 151-169, apply to Postal Service labor relations. For that reason, the federal courts have applied decisions under LMRA § 301 to the Postal Service context. *See, e.g., American Postal Workers Union v. United States Postal Service*, 823 F.2d 466, 469 (11th Cir. 1987); *Nat'l Ass'n of Letter Carriers v. United States Postal Service*, 590 F.2d 1171, 1174-75 (D.C. Cir. 1978).

> lective bargaining agreements and includes within that federal law *specific performance of promises to arbitrate grievances* under collective bargaining agreements. . . . That is our construction of § 301 (a), which means that the agreement to arbitrate grievance disputes, contained in this collective bargaining agreement, should be *specifically enforced.*

Lincoln Mills, supra, 353 U.S. at 450-51 (emphasis added). Although the federal common law announced in *Lincoln Mills* was, like any common law to be judicially developed on a case-by-case basis, the federal courts are not free to develop this law according to their own policy preferences, but must strive to effectuate the federal labor policy as expressed by Congress:

> The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Some will lack express statutory sanction but will be solved by *looking at the policy of the legislation and fashioning a remedy that will effectuate that policy.*

Id., 353 U.S. at 456-57 (emphasis added).

(b) In decisions subsequent to *Lincoln Mills,* this Court has developed these principles into a well-articulated doctrine. To effectuate federal labor policy, the federal courts are empowered to enforce the terms of those collective bargaining agreements; but they have no power to modify the terms of freely negotiated collective bargaining agreements. In particular, the courts cannot compel submission of a dispute to an arbitration forum to which the parties are not contractually bound.

In *H.K. Porter Co., supra,* 397 U.S. 99, for example, the Court held that National Labor Relations Act (NLRA) § 8(d), 29 U.S.C. § 158(d), prohibits the NLRB from compelling an employer to agree to be bound by a specific provision of a collective bargaining agreement, even if the NLRB finds that the employer's

refusal to so agree is in bad faith.[6] The Court stressed the fundamental importance of the freedom of collective bargaining and the consequent necessity of official non-interference:

> The Board's remedial powers under § 10 of the Act are broad, but they are limited to carrying out the policies of the Act itself. One of these fundamental policies is freedom of contract. While the parties' freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.

H.K. Porter Co., supra, 397 U.S. at 108 (footnotes omitted). *See also NLRB v. Burns International Security Services, supra,* 406 U.S. at 284, 287.

Subsequently, in *Carbon Fuel Co., supra,* 444 U.S. 212, the Court made clear that this "hands off" policy applies equally to the federal courts under § 301. The Court cited NLRA § 8(d) and the decisions interpreting it, and concluded that "i[t] follows that the parties' agreement primarily determines their relationship." *Id.*, 444 U.S. at 219. Relying on its decision in *Warrior & Gulf Navigation Co., supra,* 363 U.S. at 582, that the courts cannot compel arbitration without an agreement to arbitrate, the Court concluded, "If the parties' agreement specifically resolves a particular issue, the courts cannot substitute a different resolution." *Id. See also Rawson, supra,* 58 U.S.L.W. at 4559 (" 'when neither the collective-bargaining process nor its end product violates any command of Congress, a federal court has no authority to modify the

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[6] NLRA § 8(d) provides that the obligation to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. § 158(d).

substantive terms of a collective-bargaining contract' ") (quoting *Robinson, supra*, 455 U.S. at 576).[7]

A corollary principle—that the courts may not compel submission of a dispute to an arbitration forum or procedure to which the parties are not even arguably contractually bound—has also been clearly enunciated and adhered to by this Court. Thus, although federal labor policy favors the private resolution of industrial disputes, that policy has a crucial caveat: such private resolution method must be strictly voluntary, in compliance with the strong federal labor policy of encouraging *free* collective bargaining. This balanced corollary, established by Congress in the LMRA, has been explained and applied in an unbroken line of this Court's decisions.

Thus, in *American Manufacturing Co., supra*, 363 U.S. 564, the Court looked to the federal labor policy expressed in LMRA § 203(d), 29 U.S.C. § 173(d), which provides that " '[f]inal adjustment *by a method agreed upon by the parties* is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement.' " *American Manufacturing Co., supra*, 363 U.S. at 566 (quoting 29 U.S.C. § 173(d)) (emphasis added). From this congressional declaration,

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[7] This Court's decisions implying a no-strike clause into labor agreements containing arbitration clauses are not to the contrary. *See, e.g., Teamsters Local 174 v. 1 Lucas Flour Co.*, 369 U.S. 95 (1962). In such cases, a no-strike clause is *implied in fact* from the existence of an arbitration clause covering the dispute in question. That is, the Court applies a principle of contract interpretation that presumes that inclusion of an arbitration clause is an expression of the parties' *intent* that the union be prohibited from striking over, rather than arbitrating, any arbitrable dispute, but allows the presumption to be rebutted by evidence of a contrary intent. *Gateway Coal Co., supra*, 414 U.S. at 282. Thus, the question in such cases is ultimately one of contract construction, not of imposing upon one or more of the parties a court-dictated solution to a labor relations issue.

the Court concluded that federal labor policy "can be effectuated *only if the means chosen by the parties* for settlement of their differences under a collective bargaining agreement is given full play." *Id. See also Warrior & Gulf Navigation Co., supra*, 363 U.S. at 582; *Gateway Coal Co., supra*, 414 U.S. at 374; *AT&T Technologies, Inc., supra*, 475 U.S. at 648-49.[8]

(c) This Court's cases also establish conclusively that the limited nature of the federal common law of labor relations, and the concomitant *voluntary* character of labor arbitration, are not confined to bilateral disputes, but extend with equal force to disputes between an employer and two or more unions. In *Carey, supra*, 375 U.S. 261, the Court held that the courts should grant requests for bilateral contractual arbitration of jurisdictional disputes, even though such a proceeding might not result in a final resolution of the entire controversy. At no point in that decision did the Court ever suggest that the federal courts have power under § 301 to compel *noncontractual* trilateral arbitration of such disputes. Nor was this possibility suggested by the dissenting opinion, which specifically relied upon the asserted inability of bilateral arbitration to resolve jurisdictional disputes. *See id.*, 375 U.S. at 273-76 (Black, J., joined by Clark, J., dissenting).

Subsequently, in *Plasterers' Local Union No. 79, supra*, 404 U.S. 116, the Court approved the NLRB's policy of

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[8] The Court applies a rule of *interpretation* of contracts that favors arbitrarily, and therefore presumes that disputes are arbitrable, absent some clear indication to the contrary. *Warrior & Gulf, supra*, 363 U.S. at 582-83. This presumption, however, once again (*see* n. 7, *supra*), is simply an aid in discovering the parties' intent, and not an imposition of a duty to arbitrate without regard to that intent. *Warrior & Gulf, supra*, 363 U.S. at 582 ("a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit"); *A T & T Technologies, supra*, 475 U.S. at 648-50; *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 372 (1984) (presumption of arbitrability "best accords with the parties' presumed objectives in pursuant collective bargaining").

refusing to defer to mechanisms for the private settlement of jurisdictional disputes unless *all* parties before the NLRB have agreed to be bound by the results of such mechanisms. The Court stated,

> Although this Court has frequently approved an expansive role for private arbitration in the settlement of labor disputes, this enforcement of arbitration agreements and settlements has been predicated on the view that the parties have *voluntarily bound themselves* to such a mechanism at the bargaining table. . . . [W]e decline to narrow the Board's powers . . . so that [parties] are coerced to accept compulsory private arbitration when Congress has declined to adopt such a policy.

Id., 404 U.S. at 133-34 (emphasis added).[9]

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[9] That federal labor policy is indeed hostile to the resolution of jurisdictional disputes through compulsory tripartite arbitration is apparent from the legislative history of the LMRA alluded to in *Plasterers' Local Union No. 79, supra*, 404 U.S. at 133-134. That history shows that although the original Senate bill permitted the NLRB to refer jurisdictional disputes to compulsory tripartite arbitration (*see* H.R. 3020 § 10(k), *reprinted in* 1 NLRB *Legislative History of the Labor Management Relations Act, 1947*, at 258-59 (1985)), this provision of the bill was deleted by the Conference Committee (*see* H. Conf. Rep. No. 510, 89th Cong., 1st Sess. at 15, *reprinted in* 1 NLRB *Legislative History, supra*, at 519). Instead, the NLRB was directed to resolve such disputes itself (*see id.*), and the circumstances under which the NLRB would be permitted to intervene into jurisdictional disputes was also strictly limited to instances in which illegal action to compel a work assignment had occurred (*see* 29 U.S.C. § 160(k)).

Thus, Congress provided an *administrative* mechanism for governmental intervention into jurisdictional disputes, and intended that mechanism to be available only under certain carefully delineated circumstances not present in the instant case. By so doing, Congress "expressed a clear preference for Board decision as compared with compelled arbitration, and . . . this policy preference must be respected." *See also NLRB v. Radio and Television Broadcast Engineers Union, Local 1212*, 364 U.S. 573, 581-82 (1961) (by deleting the provision for a Board-appointed arbitrator, Congress

In short, an unbroken line of this Court's precedents establishes that federal courts may *enforce* arbitration provisions in collective bargaining agreements, and in the course of doing so may develop federal common law principles concerning the interpretation and vindication of collective bargaining agreements; but the courts may not *alter* the parties' agreement in the name of federal common law by compelling the parties to submit to a dispute resolution mechanism other than one established in the agreement. Where, as here, an arbitrator has already ruled on the meaning of the agreement, the arbitrator's ruling may be set aside only if it does not draw its essence from the agreement. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597-99 (1960).

2. *The Ninth Circuit's Decision.* The Ninth Circuit sought to avoid this conclusion by construing this Court's § 301 federal common law cases much more broadly, as permitting courts to *revise* the dispute resolution mechanism established by the governing collective bargaining agreement as long as there is a "contractual nexus . . . as to both (a) the parties and (b) the subject matter." Pet. App. 5a. In support of its authority to compel departure from the contractually-created dispute resolution scheme in this manner, the Court of Appeals maintained that its departure from the contractual scheme was a minor one; relied on this Court's decision in *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964) for the proposition that this Court "has been somewhat lenient in deciding which parties will be required to arbitrate. . . . [and] has not required strict contractual privity," (Pet. App. 6a); and rested upon its authority to devise federal common law, citing *Lincoln Mills, supra.*

In fact, the underlying premise of the Court of Appeals opinion would permit federal courts wide authority to interfere with the dispute resolution mechanism established by parties to labor agreements. As *Wiley* in-

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placed "the responsibility for compulsory determination of the dispute *entirely* on the Board") (emphasis added).

dicates, there is no cognizable difference between court determination of procedural issues addressed by the contract, and court determination of substantive issues under the agreement, in terms of national labor policy. And neither *Wiley* nor any other case of this Court sanctions, as part of the federal courts' responsibility to devise federal common law under § 301, court imposition of an arbitral procedure (or any other contractual provision) that is directly and demonstrably *contrary* to the intentions of the contracting parties, whether that procedural alteration involves the parties to the arbitration or some other court-imposed innovation.

(a) Although the Court of Appeals opinion does not so acknowledge, there is no difference in principle between a court-ordered tripartite arbitration contrary to the dispute resolution scheme established by the contract and any other procedural change a court might regard as more likely to lead to an equitable result. Like other procedural isuses, the number of parties participating in an arbitration can determine the complexity and length of the proceedings, and may also have some impact upon the outcome, as the vigor with which this case has been contested by all parties suggests. This is why issues concerning which parties will participate in a particular proceeding are treated at length as procedural issues under the Federal Rules of Civil Procedure (*see* Fed. Rule Civ. Pro. Rules 14, 17-25), coequal with issues concerning timeliness, pleadings, discovery, joinder of causes of action, the identity of the finder of fact, summary adjudication, and remedies.

In devising arbitration procedures, the parties to a collective bargaining agreement necessarily address themselves to all manner of procedural questions similar to those covered by the Federal Rules of Civil Procedure, including the identity of the arbitrator, the availability of summary procedures or mediation, the nature and timing of briefing, and so on. *See generally*, S. Elkouri and

E. Elkouri, *How Arbitration Works*, 222-95 (4th ed. 1985). Thus, if the federal courts are free to compel parties to accept tripartite arbitration, a procedural innovation to which they have not agreed, merely on the ground that there is a "contractual nexus" because the parties have agreed to *some* arbitration procedure as to a particular matter, then the courts will also be free to compel adherence to all manner of procedural innovations the courts may regard as more "practicable, economical, convenient, and fair" (Pet. App. 8a) than the ones the parties devised for themselves.[10] *See* Daily Labor Report (BNA), May 18, 1990, at A4-A6 (reporting on May 11, 1990 meeting of American Arbitration Association at which procedural innovations in arbitration were discussed.[11]

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[10] Moreover, the court of appeals' premise that there were in fact two existing arbitrations to "consolidate" (Pet. App. 6a) is demonstrably erroneous. The court of appeals itself admitted that the Mail Handlers never initiated the dispute resolution procedure under its own collective bargaining agreement because it "could not actually invoke the arbitration procedures under its agreement until the work was taken from its jurisdiction." Pet. App. 7a.

[11] Disputes comparable to the disagreement in this case concerning the parties and format of the arbitration frequently arise as to the procedures to be employed in arbitrations. Such disputes, for example, include controversies regarding the identity of the arbitrator (*Amalgamated Meat Cutters, Local 195 v. Cross Brothers Meat Packers, Inc.*, 518 F.2d 1113, 1121 (3d Cir. 1975); *Local Freight Drivers, Local No. 208 v. Braswell Motor Freight Lines, Inc.*, 422 F.2d 109, 112 (9th Cir. 1970), *cert. denied*, 400 U.S. 827 (1970); *General Drivers and Helpers Union, Local 554 v. Young and Hay Transportation Co.*, 522 F.2d 562, 567 (8th Cir. 1975)), the appropriate parties to the arbitration (*Int'l B'hd of Electrical Workers v. Western Electric Co.*, 661 F.2d 514, 516 (5th Cir. 1981); *United Steelworkers v. Smoke-Craft, Inc.*, 652 F.2d 1356, 1360 (9th Cir. 1981); *Matter of Arbitration Between Edward L. Beamer v. Texaco, Inc.*, 427 F.2d 885 (9th Cir. 1970)), and the steps necessary to invoke the grievance arbitration procedure (*Washington Hospital Center v. Service Employees Int'l Union, Local 722*, 746 F.2d 1503,

(b) Nor is there any difference of principle between court-imposed procedural schemes for settling labor disputes and any other court-imposed provision overriding a collective bargaining agreement, in terms of the destructive influence upon free collective bargaining generally and upon the role of arbitration particularly. As this Court has noted, "[l]abor disputes . . . cannot be broken down so easily into their 'substantive' and 'procedural' aspects." *Wiley, supra*, 376 U.S. at 557. For that reason, this Court has directed to arbitration not only the subject matter of labor disputes, but also "procedural matters which grow out of the dispute and bear on its final disposition." *Id.*

Wiley's discussion of procedural arbitrability surely did not contemplate that once an issue of that kind has been determined by the arbitrator, as it has been here, there

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1507 (D.C. Cir. 1984); *Philadelphia Printing Pressman's Union No. 16 v. Int'l Paper Co.*, 648 F.2d 900, 903 (3d Cir. 1981); *Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*, 860 F.2d 1420, 1424 (7th Cir. 1988)).

There is currently a conflict between the courts of appeal as to whether the federal courts should decide questions of procedural arbitrability in the first instance where there are no factual disputes to resolve as to those procedural questions, or whether the federal courts should instead refer those questions to the arbitrator for decision, as they do where factual disputes exist. *See United Steelworkers v. Cherokee Electric Cooperative*, —— U.S. ——, 108 S. Ct. 1601, 1601-02 (1988) (White, J., dissenting from the denial of a petition for writ of certiorari). Regardless of which authority—the federal courts or the arbitrators—properly decide threshold questions as to procedural arbitrability in the narrow class of cases in which there are no material factual disputes, those procedural questions have *always* been approached as questions of contract interpretation in which the court *or* the arbitrator strives to determine the intent of the parties. (See cases discussed in previous paragraph.) *No* court, outside of the tripartite arbitration context, has held that § 301 gives the federal courts the power to *override* the intent of the parties in order to compel adherence to procedures that may be more "practicable, economical, convenient and fair." Pet. App. 8a.

can be a return to the courts to consider whether the parties' intent, as determined by the arbitrator, should be disregarded in pursuit of more equitable or efficient procedures. Indeed, it is no more or less destructive of the process of free collective bargaining for a court to override the parties' procedural solutions than it is for the courts to displace the parties' decision on substantive questions.[12]

(c) The Court of Appeals suggested, however, that another part of *Wiley* does support an authority in federal courts to *reject* contractually-established dispute resolution systems, and to substitute therefor judge-created procedures. In fact, however, the two aspects of the *Wiley* opinion are, as one would expect, entirely consistent, both with each other and with this Court's general support for free collective bargaining and voluntary arbitration schemes.

In *Wiley*, the threshold question was whether the employing entity that resulted from a merger between two other employers was required to arbitrate under a collective bargaining agreement entered into by one of the predecessor employers concerning post-merger labor relations obligations. This Court held that a successor employer could be bound to arbitrate where there was sufficient continuity of the business enterprise. In so de-

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[12] This case is illustrative: As noted above, the Postal Service chose to forego the opportunity of proposing a tripartite arbitration procedure in collective bargaining negotiations with the APWU. If such a proposal had been made, the APWU would have had the opportunity of considering it, bargaining over it, and receiving desired concessions from the Postal Service in return for agreeing to it. The Court of Appeals' decision to rewrite the agreement to give the Postal Service a benefit that it could have, but did not, seek through collective bargaining undermines the central principle of federal labor policy—the sanctity of free collective bargaining—and robs the APWU of whatever other benefit that it could have obtained in collective bargaining by agreeing to a tripartite arbitration procedure.

ciding, however, the *Wiley* Court was attempting to vindicate, not override through noncontract-based federal common law, the dispute resolution mechanism created by the parties to the relevant collective bargaining agreement:

> The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty. Thus, just as an employer has no obligation to arbitrate issues which it has not agreed to arbitrate, so *a fortiori*, it cannot be compelled to arbitrate if an arbitration clause does not bind it at all . . . We . . . find Wiley's obligation to arbitrate this dispute *in the Interscience contract construed in the context of a national labor policy.* [376 U.S. at 547, 550-51 (emphasis supplied).]

And the *Wiley* Court specifically *rejected* imposition of a bargaining obligation upon a successor employer where the "duty to arbitrate [would be] something imposed from without, not reasonably to be found in the particular bargaining agreement and the acts of the parties involved." *Id.* at 551. *See also NLRB v. Burns International Security Services, supra,* 406 U.S. at 286, 287 (emphasis supplied) (noting that *Wiley* "held only that the agreement to arbitrate, '*construed in the context of national labor policy*,' survived the merger," and holding that under *H.K. Porter, supra,* imposing a collective bargaining agreement upon a successor employer where there is *no* contractual basis whatever for the imposition would constitute impermissible " 'official compulsion over the actual terms of the contract' "); *Howard Johnson Co. v. Detroit Joint Executive Board,* 417 U.S. 249, 257 (1974) (viewing *Wiley* as a case in which, given the merger context, "holding Wiley bound to arbitrate under its predecessor's collective bargaining agreement may have been fairly within the reasonable expectations of the parties . . . to

the extent that its promises were intended to survive a change in ownership.")

Thus, the successorship aspect of *Wiley* was simply an application of the general principle that a federal court should order arbitration "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. . . . [and] [d]oubts should be resolved in favor of coverage." *Warrior & Gulf Navigation Co., supra*, 363 U.S. at 582-83. *See* discussion *supra*, at p. 18. *Wiley* was *not* a case, like this one, where we already know "with positive assurance that the arbitration clause is not susceptible of an interpretation that covers" the employer's preferred procedure, because an arbitrator under the contract has already so determined. And *Wiley* was therefore *not* an opinion sanctioning complete abandonment of the consensual nature of arbitration, and substitution of court-imposed obligations in the name of a broad-based federal common law of labor relations.

3. *Importance of the Issue*: While the narrow issue in this case—whether court-ordered tripartite arbitration is permissible—has arisen with some frequency in the district court [13] and has been alluded to by federal courts of appeal other than the Ninth Circuit,[14] the Second Circuit is the only court of appeals that has directly approved

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[13] *RCA Corp. v. Local Union 1666 Int'l Bhd. of Electrical Workers*, 633 F. Supp. 1009 (E.D. Pa. 1986); *American Broadcasting Co. v. Nat'l Ass'n of Broadcast Employees and Technicians*, 112 L.R.R.M. 2446 (N.D. Cal. 1982); *Baltimore Typographical Union No. 12 v. A.S. Abell Co.*, 411 F. Supp. 596 (D. Md. 1977) *aff'd. mem.*, 588 F.2d 1347 (4th Cir. 1979)) (all upholding court-ordered tripartite arbitration); *Meat Cutters Local 299 v. Alpha Beta Markets, Inc.*, 96 LRRM 2509 (S.D. Cal. 1977) (contra).

[14] *Laborers International Union of North America, Local 309 v. W.W. Bennett Constr. Co., Inc.*, 686 F.2d 1267 (7th Cir. 1982); *Window Glass Cutters League v. American St. Gobain Corp.*, 428 F.2d 253 (1970).

compelled tripartite arbitration of a jurisdictional dispute where the collective bargaining agreements provided only for bipartite arbitration. *See Columbia Broadcasting System, Inc. v. American Recording and Broadcasting Ass'n*, 414 F.2d 1326 (2d Cir. 1969).[15] Thus, although the issue is a recurring one of great practical importance in labor relations, the *result* of the Court of Appeals in this case, standing alone, might not merit this Court's attention.

What is of critical importance, however, and does merit this Court's immediate attention, is that the tripartite arbitration line of cases, culminating in the decision below, is based upon a view of the role of federal courts under § 301 of the LMRA that would inject the courts into both procedural and substantive questions which must instead be left for arbitrators to decide. The Court of Appeals' approach to this case harkens back to the days of the labor injunction, when federal courts saw their role as imposing their own view of appropriate labor relations upon the parties and the nation. *See, e.g., Jacksonville Bulk Terminals, Inc. v. Int'l Longshoremen's Ass'n*, 457

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[15] In so ruling, the Second Circuit relied primarily upon this Court's decision in a case decided under the Railway Labor Act (RLA), *Transportation-Communication Employees Union v. Union Pacific Railroad Co.*, 385 U.S. 157 (1966). As the Ninth Circuit has recognized, however, the foundation of this Court's decision to compel tripartite arbitration in *Transportation-Communication Employees* was that, under the RLA, tripartite arbitration of jurisdictional disputes is mandated by *statute*, while "the kind of expansive purview given to the Railroad Adjustment Board [over jurisdictional disputes] remains beyond what the Supreme Court has ruled as being within the limited competence of the labor arbitrator [in the LMRA context] whose authority arises out of a collective bargaining agreement." *Louisiana-Pacific Corp. v. Int'l Bhd. of Electrical Workers*, 600 F.2d 219, 224 (9th Cir. 1979). Not surprisingly, therefore, the Ninth Circuit in this case did not rely on *Transportation-Communication Employees* at all, but reached the same result as the Second Circuit based on different reasoning.

U.S. 702, 708 (1982); *Boys Markets, Inc. v. Retail Clerk's Union, Local 770*, 398 U.S. 235, 250-51 (1970). In the more than forty years since the passage of § 301, this Court has never deviated from the position that that provision did *not* reinstate the federal courts, acting upon their own understanding of effective labor policy, as the ultimate authority over labor disputes. Rather, § 301 simply created in the courts the ability to aid the parties in reaching their *own* solution to their problems, via free collective bargaining and voluntary arbitration. The misunderstanding exhibited by the Ninth Circuit (and the Second Circuit) in this regard is basic, and so threatening to the sound development of national labor policy that it should be corrected before the error spreads further.

CONCLUSION

For the foregoing reasons, the Court should issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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June 13, 1990

APPENDIX

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 88-15284

D.C. No. CV-83-1383-WWS

UNITED STATES POSTAL SERVICE,
Plaintiff-Appellee,

v.

AMERICAN POSTAL WORKERS UNION, AFL-CIO,
Defendant-Appellant,

v.

NATIONAL POST OFFICE MAIL HANDLERS, WATCHMEN, MESSENGERS AND GROUP LEADERS DIVISION OF THE LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO,
Defendant-Cross-Claimant-Appellee.

Appeal from the United States District Court
for the Northern District of California
William W. Schwarzer, District Judge, Presiding

Argued and Submitted
October 5, 1989—San Francisco, California

Filed January 12, 1990

Before: William A. Norris, David R. Thompson and Diarmuid F. O'Scannlain, Circuit Judges.

Opinion by Judge Thompson

Darryl J. Anderson, O'Donnell, Schwartz & Anderson, Washington, D.C., for the defendant-appellant.

Kevin B. Rachel, Office of Labor Law, United States Postal Service, Washington, D.C., for the plaintiff-appellee.

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OPINION

THOMPSON, Circuit Judge:

The American Postal Workers Union ("APWU") appeals the district court's decision ordering tripartite arbitration among the APWU, the United States Postal Service ("USPS"), and the National Post Office Mail Handlers, Watchmen, Messengers and Group Leaders Division of the Laborers' International Union of North America ("Mail Handlers"). This case presents a question of first impression: whether a district court may order parties to submit a dispute to tripartite arbitration despite their contractual agreements which provide only for bipartite arbitration. We hold that a district court can enter such an order and properly did so in this case.

FACTS

The APWU and the Mail Handlers represent postal employees. Until 1981, these two unions (and a third not involved in this case) bargained with the USPS collectively. Since 1981, however, the Mail Handlers have chosen to bargain separately.

The collective bargaining agreements between the USPS-APWU and the USPS-Mail Handlers are virtually identical in many respects. Both agreements contain broad provisions requiring that all disputes be submitted to arbitration. Formerly, when the unions negotiated as a unit, their single agreement contained a provision for tripartite arbitration to resolve disputes over which union had jurisdiction of a certain type of work. The present

separate agreements do not contain such a tripartite arbitration provision.

The current dispute arose at the USPS' San Francisco Air Mail Facility when the USPS assigned work to employees under the Mail Handlers' jurisdiction. The APWU filed a grievance. It alleged that the work should have been assigned to members of its union according to Regional Instruction 399, "Mail Processing Work Assignment Guidelines," by which all three parties are bound. Following the grievance procedure, the USPS-APWU dispute was scheduled for arbitration. The Mail Handlers attempted to intervene in this arbitration. The arbitrator concluded that despite the Mail Handlers' obvious interest, they could not intervene because the USPS-APWU agreement did not permit such intervention.

On April 12, 1988, the USPS filed suit in district court against the APWU and the Mail Handlers to compel tripartite arbitration. The APWU filed an answer and asserted counterclaims against the USPS. The Mail Handlers filed an answer and asserted crossclaims and counterclaims against the USPS and the APWU seeking tripartite arbitration and a permanent injunction covering any future jurisdictional disputes. The parties moved for summary judgment. The court granted the USPS' motion for summary judgment and ordered tripartite arbitration. The Mail Handlers' request for a permanent injunction was denied. The court later amended its order and denied the APWU's summary judgment motion. The APWU appeals. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

ANALYSIS

A. *Finality of the Order Compelling Arbitration as to the Mail Handlers*

The APWU contends that because the district court's order only specifically denied the Mail Handlers' request for a permanent injunction, the Mail Handlers' motion

for summary judgment seeking tripartite arbitration was never ruled upon; therefore there is no final judgment compelling tripartite arbitration as to the Mail Handlers. We disagree. The district court clearly ordered the requested tripartite arbitration and specifically denied the Mail Handlers' request for a permanent injunction. The district court recognized the Mail Handlers' entire summary judgment motion: "defendant Mail Handlers moves for summary judgment on both its counterclaim against plaintiff and its *cross-claim against APWU.*" (emphasis added). These claims were for tripartite arbitration.

In light of the district court's order compelling tripartite arbitration pursuant to the USPS' motion, it would be illogical to assume that the court considered and rejected the Mail Handlers' motion for the same relief. All parties had a clear understanding of the practical effects of the judgment, and no prejudice results from construing the judgment as a final judgment in regard to both parts of the Mail Handlers' motion. The judgment entered August 12, 1988 serves as a "final decision" reviewable by this court. *See Alaska v. Andrus*, 591 F.2d 537, 540 (9th Cir. 1979) (order did not expressly reject party's motion, but served as final judgment for purpose of appeal); *cf. Bankers Trust Co. v. Mallis*, 435 U.S. 381, 387 (1978) (Court did not require order to be a separate document where the district court clearly evidenced its intent). We conclude that the order compelling tripartite arbitration is a final order as to the Mail Handlers, as well as to the USPS and the APWU.

B. *Authority to Order Tripartite Arbitration*

1. *Applicability of Section 301 of the Labor-Management Relations Act, 29 U.S.C. §185(a) (1982)*

Section 1208(b) of the Postal Reorganization Act, 39 U.S.C. § 1208(b) (1982), grants district courts jurisdiction over suits for violation of contracts among the USPS

and unions representing postal employees. Section 1209 provides that all consistent provisions of title 29, chapter 7, subchapter 11 apply. Thus, cases interpreting the nearly identical Labor-Management Relations Act section 301, 29 U.S.C. § 185(a) (1982), have been applied to determine the scope of a district court's authority in cases under the Postal Reorganization Act. *See, e.g., American Postal Workers Union v. United States Postal Serv.*, 823 F.2d 466, 469 (11th Cir. 1987); *National Ass'n of Letter Carriers v. United States Postal Serv.*, 590 F.2d 1171, 1174-75 (D.C. Cir. 1978).

2. *Contractual Nexus Required for Compulsory Arbitration*

Despite a presumption for arbitration when a contract contains an arbitration clause, *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 650 (1986), a court can only compel arbitration pursuant to the parties' contract. *See, e.g., United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960) ("arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit"); *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 374 (1974) ("No obligation to arbitrate a labor dispute arises solely by operation of law. The law compels a party to submit his grievance to arbitration only if he has contracted to do so."). For the district court to have the power to compel tripartite arbitration, a contractual nexus is required as to both (a) the parties and (b) the subject matter.

In the current dispute, all parties agree that the *merits* of the work jurisdiction dispute are covered by the arbitration provisions of both the USPS-APWU contract and the USPS-Mail Handlers contract. Thus, although separate contracts exist, the dispute will be arbitrated; the question is which parties will participate in the first round of arbitration.

The Supreme Court has been somewhat lenient in deciding which parties will be required to arbitrate. The Court has not required strict contractual privity. *See, e.g., John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964) ("successor employer" bound to arbitrate under predecessor's agreement with union). Nevertheless, some contractual nexus must exist. *See Laborers' Int'l Union v. W.W. Bennett Constr. Co.*, 686 F.2d 1267, 1274 (7th Cir. 1982) ("*Bennett*"). In the current dispute, all parties are contractually obligated to arbitrate, albeit in bipartite proceedings. *See id.*

> Only if the arbitrator is empowered to make binding interpretations of both agreements in the usual three-party jurisdictional dispute can he resolve the entire controversy as would the NLRB. At a minimum, this would require that each union be bound by an arbitration agreement with its employer which arguably covers work assignment disputes.

Id. at 1276. Tripartite arbitration is, in effect, a consolidation of two individual, consensual arbitrations. *See id.* at 1274. Here, the requisite contractual nexus is present: all of the parties have agreed to the arbitration of the merits of the current dispute.

3. *Suitability of Tripartite Arbitration*

Despite the existence of the requisite contractual nexus, the district court must examine other factors to ensure that tripartite arbitration is a suitable remedy for the actual case before it. *See Columbia Broadcasting Sys., Inc. v. American Recording & Broadcasting Ass'n*, 414 F.2d 1326, 1329 (2d Cir. 1969) ("*CBS*") (although the district court had power to order tripartite arbitration because of the contractual nexus, there was still a question as to whether the power was properly exercised). These factors include (a) the nature of the relevant arbitration provisions, (b) the invocation of each arbitration provision by a party to the agreement, and (c) any pro-

cedural concerns surrounding the implementation of tripartite arbitration. *See Bennett*, 686 F.2d at 1274; *CBS*, 414 F.2d at 1329.

Here, each separate agreement in question contains a provision requiring arbitration of any:

> dispute, difference, disagreement or complaint between the parties related to wages, hours, and conditions of employment. A grievance shall include, but is not limited to, the complaint of an employee or of the Union(s) which involves the interpretation, application of, or compliance with the provisions of this Agreement or any local Memorandum of Understanding not in conflict with this Agreement.

Article 15, § 15.1, USPS-Mail Handlers Agreement, July 21, 1984-July 20, 1987; USPS-APWU Agreement, 1984-1987. By the use of these broad arbitration provisions, the parties have expressed a strong general preference for arbitration of contractual disputes.

We are also satisfied that "each arbitration agreement had been invoked by a party to the agreement." *Bennett*, 686 F.2d at 1274. The APWU clearly invoked its agreement with the USPS by initiating the grievance procedure. Further, the Mail Handlers' attempt to intervene in the arbitration was essentially an invocation of its agreement with the USPS. The Mail Handlers could not actually invoke the arbitration procedures under its agreement until the work was taken from its jurisdiction. However, the Mail Handlers clearly evidenced a desire to arbitrate. The Mail Handlers will not be penalized for attempting a more timely resolution of the dispute.

We are not faced with any procedural difficulties in this case. *See Bennett*, 686 F.2d at 1275 n.3 (noting possible difficulty in selecting a neutral arbitrator pursuant to two different agreements). The Mail Handlers have agreed to follow the arbitration procedures outlined by the USPS-APWU agreement. Thus, the APWU will not

be prejudiced by any alterations to the procedural structure of the arbitration to which it agreed. *See, e.g., Avis Rent A Car Sys. v. Garage Employees Union*, 791 F.2d 22, 23-25 (2d Cir. 1986) (arbitrator chosen under the "significantly different" procedure of an agreement cannot apply substantive provisions of a second agreement).

Compelling all three parties in this case to submit their grievance to the same arbitration is practicable, economical, convenient, and fair. It not only avoids duplication of effort, but also avoids the possibility of conflicting awards. *See CBS*, 414 F.2d at 1329. In our circuit, the possibility of conflicting awards is a serious threat because of our decision in *Louisiana-Pacific Corp. v. International Bhd. of Electrical Workers*, 600 F.2d 219 (9th Cir. 1979). Parties must request court intervention *before* receiving conflicting awards, otherwise the conflicting awards will stand—even if the awards claim to apply the same substantive rule. *Id.* at 226 (court reserved opinion on the propriety of compelling triparite arbitration).

Finally, the conclusions of the arbitrator should be considered. Although the arbitrator denied the Mail Handlers' petition to intervene in the USPS-APWU arbitration, he did so because he concluded that the USPS-APWU contract did not permit him to admit the Mail Handlers to the arbitration. Nonetheless, the arbitrator expressed his view that tripartite arbitration would be appropriate. He stated: "There is no question that the Mail Handlers have a strong, legitimate interest in the outcome of this arbitration." The arbitrator was also concerned "about the fundamental fairness of a grievance arbitration wherein the employer rather than the union represents the interests of certain employees. Tripartite arbitration is clearly the most sensible way to proceed."

In light of the trend in federal common law toward compelling tripartite arbitration under similar circumstances, we conclude that the district court did not err in ordering the APWU, the Mail Handlers, and the USPS

to engage in triparite arbitration. *See Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957) (Federal courts must apply "federal law, which the courts must fashion from the policy of our national labor laws . . . . The range of judicial inventiveness will be determined by the nature of the problem.").

C. *Statute of Limitations*

The APWU also argues that the USPS suit was untimely. The USPS filed suit in district court approximately eight months after the arbitrator refused to permit the Mail Handlers to intervene in the APWU-USPS arbitration.

1. *The Six-Month Statute of Limitations*

Section 301 does not contain any statute of limitations period. Thus, the Supreme Court has held that the timeliness of a section 301 suit for breach of a collective bargaining agreement is determined "as a matter of federal law, by reference to the appropriate state statute of limitations." *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 705 (1966). However, the Supreme Court modified this decision and applied the six-month statute of limitations in section 10(b) of the National Labor Relations Act, 29 U.S.C. 160(b) (1982), to a "hybrid" section 301/unfair representation action. *Del Costello v. International Bhd. of Teamsters*, 462 U.S. 151 (1983).

This circuit, in *Teamsters Union Local 315 v. Great Western Chem. Co.*, 781 F.2d 764 (9th Cir. 1986), held that the same six-month period should apply to the filing of a petition to compel arbitration of a dispute under a collective bargaining agreement. *Id.* at 769. The six-month period enables parties to attempt private dispute reconciliation, yet provides for a relatively rapid resolution of the labor dispute. *See id.* at 767. The period begins to run from the time one party makes it clear that it will not submit the matter to arbitration. *Id.* at 769.

The APWU failed affirmatively to plead or assert the six-month statute of limitations as a defense in the district court. Federal Rule of Civil Procedure 8(c) requires that a statute of limitations defense be pleaded or it is waived. *Perry v. O'Donnell*, 749 F.2d 1346, 1353 (9th Cir. 1985). Moreover, the APWU did not rely on the six-month limitations period in opposing the USPS' motion for summary judgment. It relied solely on the California 100-day limitations period, which we discuss *infra*. Accordingly, the six-month limitations period was waived as a defense and we will not consider it for the first time on appeal. *See Bolker v. Commissioner*, 760 F.2d 1039, 1042 (9th Cir. 1985).

2. *California's 100-Day Limitations Period*

The APWU argues that California's 100-day limitations period, contained in Cal. Civ. Proc. Code § 1288 (West 1982),[1] applies to the USPS suit, because the parties essentially seek to overturn an arbitration decision. Although we agree that California's 100-day limitations period applies to suits to overturn an arbitration decision, *Fortune, Alsweet & Eldridge, Inc. v. Daniel*, 724 F.2d 1355, 1356 (9th Cir. 1983) (per curiam), we disagree with the APWU's characterization of the present suit.

This suit is one which seeks to compel tripartite arbitration. When the arbitrator refused to permit the Mail Handlers to intervene in the USPS-APWU arbitration, he limited his decision to the explicit terms of the USPS-APWU contract. He specifically noted that he did not have authority to compel tripartite arbitration apart from the terms of the contract. *Cf. United Bhd. of Carpenters*

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[1] Section 1288 provides:

> A petition to vacate an award or to correct an award shall be served and filed not later than 100 days after the date of the service of a signed copy of the award on petitioner.

Cal. Civ. Proc. Code § 1288 (West 1982).

v. FMC Corp., 724 F.2d 815, 817 (9th Cir. 1984) (relief sought could have been obtained in arbitration proceeding —Oregon state statute of limitations, not federal six-month statute applicable). We do have authority, under federal common law, to compel tripartite arbitration. This is the relief sought in this case. The suit is not one seeking to overturn an arbitration decision. It is a suit independent of the arbitration decision seeking relief which could not be obtained in the arbitration proceeding. We conclude that California's 100-day statute of limitations is inapplicable.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 88-15284

D.C. No. CV-83-1383-WWS

UNITED STATES POSTAL SERVICE,
Plaintiff-Appellee,

vs.

AMERICAN POSTAL WORKERS UNION, AFL-CIO,
Defendant-Appellant,

vs.

NATIONAL POST OFFICE MAIL HANDLERS, WATCHMEN, MESSENGERS AND GROUP LEADERS DIVISION OF THE LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO,
Defendant-Cross-Claimant-Appellee.

Before: NORRIS, THOMPSON and O'SCANNLAIN, Circuit Judges.

ORDER

[Filed Mar. 15, 1990]

The petition for rehearing is DENIED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-88-1383-WWS

U.S. POSTAL SERVICE,

Plaintiff,

vs.

AMERICAN POSTAL WORKERS UNION
and NATIONAL MAIL HANDLERS UNION,

Defendants.

MEMORANDUM OF OPINION AND ORDER

[Filed Aug. 5, 1988]

Plaintiff United States Postal Service seeks to compel three-way arbitration of a dispute between itself and defendants American Postal Workers Union, AFL-CIO ("APWU") and National Post Office Mail Handlers, Watchmen, Messengers, and Group Leaders Division of the Laborers' International Union of North America, AFL-CIO ("Mail Handlers") regarding a work assignment. Plaintiff moves for summary judgment. Defendant APWU opposes the motion and also moves for summary judgment or, in the alternative, dismissal. Defendant Mail Handlers moves for summary judgment on both its counterclaim against plaintiff and its cross-claim against APWU, and opposes APWU's motion.

The Court has jurisdiction pursuant to sections 409 and 1208 of the Postal Reorganization Act, 39 U.S.C. §§ 409 and 1208, and 28 U.S.C. §§ 1331 and 1337.

FACTS

APWU and Mail Handlers represent separate bargaining groups of United States Postal Service employees.

Originally, the two unions jointly engaged in collective bargaining negotiations with the Postal Service. However, beginning in 1981, Mail Handlers chose to bargain separately. Since then, plaintiff's collective bargaining agreements with APWU and Mail Handlers, which provide broad grievance procedures for any "dispute, difference, disagreement or complaint between the parties related to wages, hours, and conditions of employment," do not provide for any jurisdictional mechanism that includes the other union. APWU Agreement, Article 15.1, at 58; Mail Handlers Agreement, Article 15.1, at 65.

A jurisdictional dispute arose over plaintiff's assignment of work to Mail Handlers. APWU filed a grievance challenging the work assignment and appealed the dispute to arbitration. Mail Handlers petitioned to intervene in the arbitration, but APWU opposed its petition.

The arbitrator, William Rentfro, decided that tripartite arbitation was the preferred approach, but that he lacked the authority to compel such arbitration under the terms of APWU's collective bargaining agreement. Plaintiff then brought this action seeking to compel tripartite arbitration.

DISCUSSION

The issue here is whether the Court may order tripartite arbitration in the absence of any provision for it in the collective bargaining agreement. An obligation to arbitrate under collective bargaining agreements is normally a product of the parties' agreement to arbitrate, not imposed by law. *Louisiana-Pacific Corp. v. International Brotherhood of Electrical Workers, Local 2294*, 600 F.2d 219, 224 (9th Cir. 1979).

However, section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185,[1] gives federal courts broad

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[1] Section 301 is equivalent to section 1208(b) of the Postal Reorganization Act, 39 U.S.C. § 1208(b), which controls labor disputes with the Postal Service.

jurisdiction to handle many types of controversies that arise between labor and management. *See, e.g., John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 546-51 (1964) (upholding ruling requiring new employer to arbitrate with union even where employer had never entered into contract with union); *Columbia Broadcasting System, Inc. v. American Recording & Broadcasting Ass'n*, 414 F.2d 1326, 1328 (2d Cir. 1969). Courts have the power to order performance that is, in literal terms, outside the scope of the collective bargaining agreement. *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-79 (1960) (collective bargaining agreement "is more than a contract; it is a generalized code to govern a myriad of cases which draftsmen cannot wholly anticipate. The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or a particular plant," citations and footnote omitted); *Columbia Broadcasting System*, 414 F.2d at 1328.

Pursuant to this broad judicial power, courts have frequently ordered tripartite arbitration for jurisdictional labor-management disputes, even absent contractual provisions for such arbitration. In *Columbia Broadcasting System*, 414 F.2d at 1328-29, the court upheld the district court's order compelling tripartite arbitration of a dispute over work assignment where the employer's contract with both unions contained broad arbitration provisions and the first union agreed to arbitrate the dispute before an arbitrator selected in accordance with second union's agreement. *See also American Broadcasting Co. v. Nabet*, 112 L.R.R.M. 2446 (N.D. Cal. 1982) (tripartite arbitration ordered in case factually indistinguishable from *Columbia Broadcasting System*); *RCA Corp. v. Local Union 1666, International Brotherhood of Electrical Workers*, 633 F. Supp. 1009, 1012 (E.D. Pa. 1986) (tripartite arbitration compelled in suit by employer against two

unions, each claiming the same work); *Local 201, United Ass'n of Journeymen & Apprentices v. Shaker, Travis & Quinn, Inc.*, 555 F. Supp. 314, 318-19 (S.D.N.Y. 1983) (same); *Baltimore Typographical Union No. 12 v. A.S. Abell Co.*, 441 F. Supp. 596, 602-06 (D. Md. 1977) (same); *see also Window Glass Cutters League of America v. American St. Gobain Corp.*, 428 F.2d 353, 355 (3d Cir. 1970) (refusal to compel bipartite arbitration; dicta agreeing with Second Circuit's decision in *Columbia Broadcasting System*).

Moreover, although the Ninth Circuit has yet to decide this issue, it has approved the Second Circuit's decision in *Columbia Broadcasting System*, calling the opinion "thoroughly reasoned." *Louisiana-Pacific*, 600 F.2d at 226. In *Louisiana-Pacific*, the court affirmed inconsistent arbitrator's awards conferring the identical work on two unions where both union contracts provided only for bipartite arbitration. The court suggested that the employer should have incorporated a tripartite arbitration provision in the agreements or should have initially sought the district court's assistance in compelling tripartite arbitration even in the absence of contractual provision.

It remains to be decided whether the facts of this action support an exercise of the Court's discretion to order tripartite arbitration. In this case, both collective bargaining agreements have broad, nearly identical arbitration provisions. Furthermore, Mail Handlers has agreed to arbitration with the arbitrator selected pursuant to APWU's agreement and has agreed to be bound by the this arbitration. A decision on the work dispute will necessarily affect both unions regardless of whether only one union is actively involved in the arbitration process, and if there are two separate bipartite proceedings, there is a probability of conflicting awards. Both plaintiff and Mail Handlers want tripartite arbitration and only APWU opposes it. Finally, ordering tripartite arbitration in this instance is the fairest and most efficient

course of action. Accordingly, plaintiff's motion for summary judgment ordering tripartite arbitration will be granted.

Mail Handlers also seeks a permanent injunction ordering plaintiff and APWU to engage in tripartite arbitration with Mail Handlers for all jurisdictional disputes between the two unions. It would be inappropriate to issue such an order without consideration of the particular facts to determine if tripartite arbitration is warranted. Mail Handlers' request for a permanent injunction is denied.

IT IS SO ORDERED.

DATED: August 5, 1988

/s/ William W. Schwarzer
WILLIAM W. SCHWARZER
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Docket Number C 88-1383 WWS

WILLIAM W. SCHWARZER, Judge

U.S. POSTAL SERVICE

v.

AMERICAN POSTAL WORKERS UNION and
NATIONAL MAIL HANDLERS UNION

JUDGMENT IN A CIVIL CASE

☒ Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Plaintiff's motion for summary judgment ordering tripartite arbitration is granted. Mail Handler's request for a permanent injunction is denied.

WILLIAM L. WHITTAKER
Clerk

/s/ Wynette Bailey
WYNETTE BAILEY
(By) Deputy Clerk

Date: August 5, 1988

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-88-1383-WWS

U.S. POSTAL SERVICE,
Plaintiff,

vs.

AMERICAN POSTAL WORKERS UNION and
NATIONAL MAIL HANDLERS UNION,
Defendants.

ORDER

[Filed Aug. 30, 1988]

The Court's Memorandum of Opinion and Order of August 5, 1988, is amended by the addition of the following sentence:

> The motion for summary judgment filed by defendant American Postal Workers Union is also denied.

IT IS SO ORDERED.

DATED: August 30, 1988

/s/ William W. Schwarzer
WILLIAM W. SCHWARZER
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Docket Number C 88-1383 WWS

WILLIAM W. SCHWARZER, Judge

U.S. POSTAL SERVICE

v.

AMERICAN POSTAL WORKERS UNION, *et al.*

☒ Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

The motion for summary judgment filed by defendant American Postal Workers Union is also denied.

WILLIAM L. WHITTAKER
Clerk

/s/ Wynette Bailey
WYNETTE BAILEY
(By) Deputy Clerk

Date August 30, 1988

PERTINENT STATUTES

The Postal Reorganization Act, 39 U.S.C. Section 101, et seq.

Section 409 Suits by and against the Postal Service

"(a) Except as provided in section 3628 of this title, the United States district courts shall have origignal but not exclusive jurisdiction over all actions brought by or against the Postal Service. Any action brought in a State court to which the Postal Service is a party may be removed to the appropriate United States district court under the provision of chapter 89 of title 28.

"(b) Unless otherwise provided in this title, the provision of title 28 relating to service of process, venue, and limitations of time for bringing action in suits in which the United States, its officers, or employees are parties and the rules of procedure adopted under title 28 for suits in which the Unions, its officers, or employees are parties, shall apply in like manner to suits in which the Postal Service, its officers, or employees are parties.

"(c) The provisions of chapter 171 and all other provisions of title 28 relating to tort claims shall apply to tort claims arising out of activities of the Postal Service.

"(d) The Department of Justice shall furnish, under section 411 of this title, the Postal Service such legal representation as it may require, but with the prior consent of the Attorney General, the Postal Service or its officers or employees in matters affecting the Postal Service.

Section 1208—Suits.

"(a) The courts of the United States shall have jurisdiction with respect to actions brought by the

National Labor Relations Board under this chapter to the same extent that they have jurisdiction with respect to actions under title 29.

"(b) Suits for violation of contracts between the Postal Service and a labor organization representing Postal Service employees, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy.

"(c) A labor organization and the Postal Service shall be bound by the authorized acts of their agents. Any labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

"(d) For the purpose of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal offices, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

"(e) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

The Labor Management Relations Act of 1947, 28 U.S.C. Section 141, et seq.

STATUTORY PROVISIONS

Section 158. Unfair labor practices

* * * *

(b) Unfair labor practices by labor organizations

It shall be an unfair labor practice for a labor organization or its agents—

* * * *

(4) (i) to engage in, or induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

* * * *

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft or class rather than to employees in another labor organization or in another trade, craft or class . . .

* * * *

Section 173. Functions of Service

(a) Settlement of disputes through conciliation and mediation

It shall be the duty of the Service, in order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, to assist parties to labor disputes in industries affecting commerce to settle such disputes through conciliation and mediation.

(b) Intervention on motion of Service or request of parties; avoidance of mediation of minor disputes

The Service may proffer its services in any labor dispute in any industry affecting commerce, either upon its own motion or upon the request of one or more of the parties to the dispute, whenever in its judgment such dispute threatens to cause a substantial interruption of commerce. The Director and the Service are directed to avoid attempting to mediate disputes which would have only a minor effect on interstate commerce if State or other conciliation services are available to the parties. Whenever the Service does proffer its services in any dispute, it shall be the duty of the Service promptly to put itself in communication with the parties and to use its best efforts, by mediation and conciliation, to bring them to agreement.

(c) Settlement of disputes by other means upon failure of conciliation

If the Director is not able to bring the parties to agreement by conciliation within a reasonable time, he shall seek to induce the parties voluntarily to seek other means of settling the dispute without resort to strike, lock-out, or other coercion, including submission to the employees in the bargaining unit of the employer's last offer of settlement for approval or rejection in a secret ballot. The failure or refusal of either party to agree to any procedure suggested by the Director shall not be deemed a violation of any duty or obligation imposed by this chapter.

(d) Use of conciliation and mediation services as last resort

Final adjustment by a method agreed upon by the parties is declared to be the desirable method for

settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

(e) Encouragement and support of establishment and operation of joint labor management activities conducted by committees.

The Service is authorized and directed to encourage and support the establishment and operation of joint labor management activities conducted by plant, area, and industrywide committees designed to improve labor management relationships, job security and organizational effectiveness, in accordance with the provisions of section 175a of this title.

Section 185—Suits by and against labor organizations

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf

of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process

The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency

For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

Section 187—Unlawful activities or conducts right to sue; jurisdiction; limitations; damages

(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting

commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title.

(b) Whoever shall be injured in his business or property by reason or any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

No. 89-1953

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

AMERICAN POSTAL WORKERS UNION, AFL-CIO,
Petitioner,

v.

UNITED STATES POSTAL SERVICE,

and

NATIONAL POST OFFICE MAIL HANDLERS, WATCHMEN AND GROUP LEADERS DIVISION OF THE LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the federal courts have authority pursuant to 39 U.S.C. § 1208(b) to order tripartite arbitration of a jurisdictional dispute between two unions where there exists a contractual nexus between the two unions and a common employer and there are no procedural obstacles to tripartite arbitration.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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BRIEF IN OPPOSITION

The respondent National Postal Mail Handlers Union, a division of the Laborers' International Union of North America, AFL-CIO [1] hereby opposes the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review the decision and judgment in *United States Postal Service v. American Postal Workers Union*, 893 F.2d 1117 (9th Cir. 1990) filed by the American Postal Workers Union, AFL-CIO.

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[1] Since commencement of this action, the respondent union has changed its name to National Postal Mail Handlers Union, a division of the Laborers' International Union of North America, AFL-CIO.

STATEMENT OF THE CASE

Respondent National Postal Mail Handlers Union ("Mail Handlers") supplements the facts set forth in the American Postal Workers Union's ("APWU") petition as follows: [2]

The Mail Handlers and the APWU have separate, but very similar, collective bargaining agreements with the Postal Service covering wages, hours, terms and conditions of employment. Pet. App. 2a. Both agreements incorporate, via an identical Article 19, a document entitled Regional Instruction 399, "Mail Processing Work Assignment Guidelines" ("RI-399"). E.R. 112-113, 128 & 147. Thus, all three parties of this lawsuit are contractually bound by the provosions of RI-399. Pet. App. 3a.

RI-399 was issued by the Postal Service in 1979. It sets forth each mail processing operation performed by Postal Service employees and designates the primary craft for the performance of each function—either the clerk craft (represented by APWU) or the mail handler craft (represented by the Mail Handlers). E.R. 112 & 134-139. For many years the Mail Handlers, the APWU and the Postal Service have used RI-399 as the basis for resolving work jurisdiction disputes between the Mail Handlers and the APWU. E.R. 113.

The grievance-arbitration provisions of the Mail Handlers-Postal Service and the APWU-Postal Service collective bargaining agreements are in large part identical. E.R. 119-120, 122-127 & 141-146. Both agreements contain identically-worded, broad arbitration provisions covering jurisdictional disputes. Pet. App. 7a. Each agreement provides for a three-or-four-step procedure involv-

[2] As in the petition, citations to the Petitioner's Appendix shall be denominated as "Pet. App. ——." Citations to documents contained in the Excerpt of Record filed in the Court of Appeals shall be denominated "E.R. ——."

ing discussions between union and management officials at successively higher levels followed by arbitration before a neutral arbitrator. E.R. 119-120, 122-127 & 141-146.

Although the arbitrator in this case denied intervention to the Mail Handlers because he believed he did not have authority under the APWU-Postal Service agreement to permit intervention over the APWU's objection, he did find that the Mail Handlers clearly had a "strong, legitimate interest in the outcome" of the dispute, that there was no merit to APWU's claim that the Mail Handlers' interests were sufficiently protected by the Postal Service's presence and that tripartite arbitration was clearly the most sensible way to proceed. Pet. App. 3a & 14a; E.R. 5-6 & 10.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT AMONG THE COURTS ON THE ISSUE PRESENTED HEREIN.

This Court previously considered the issue of tripartite resolution of union jurisdictional disputes in *Transportation-Communication Employees Union v. Union Pacific Railroad Co.*, 385 U.S. 157 (1956) (hereinafter cited as *Transportation-Communication Employees*). Although that case arose under the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.*, the Court relied on cases[3] decided under Section 301(a) of the Labor-Managament Relations Act, 29 U.S.C. § 185(a) (hereinafter cited as Section 301).

In that case, the Court noted that a collective bargaining agreement "is not an ordinary contract" but "a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate" and "calls into being

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[3] *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964) and *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

a new common law—the common law of a particular industry or of a particular plant." *Transportation-Communication Employees*, 385 U.S. at 160-61 *quoting United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. at 578-79. The Court rejected the argument that jurisdictional disputes between two unions should be decided on the basis of one union's collective bargaining agreement considered in isolation from all other agreements. *Transportation-Communication Employees*, 385 U.S. at 160. The Court concluded:

> In order to interpret such an agreement it is necessary to consider the scope of other related collective bargaining agreements, as well as, the practice, usage and custom pertaining to all such agreements. This is particularly true when the agreement is resorted to for the purposes of settling a jurisdictional dispute over work assignments.

Id., at 161. The Court ordered the Railroad Adjustment Board, the statutory equivalent of an arbitrator in the railroad industry,[4] to decide jurisdictional disputes between two unions in a single tripartite proceeding. *Transportation-Communication Employees*, 385 U.S. at 165.

All of the appellate and district court cases decided subsequent to the *Transportation-Communications Employees* case are in agreement with that decision and the decision of the Court of Appeals in this case. The leading case ordering tripartite arbitration under Section 301[5] is *Columbia Broadcast System, Inc. v. American*

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[4] *See* 45 U.S.C. § 183(i).

[5] This case is actually brought under Section 1208(b) of the Postal Reorganization Act, 39 U.S.C. § 1208(b), which is the postal analogue to Section 301. The federal courts freely apply Section 301 law to actions brought under 39 U.S.C. § 1208(b). *See Bowen v. United States Postal Service*, 459 U.S. 212, 232 n.2 (1983) (separate opinion of White, J.); *American Postal Workers Union v. United States Postal Service*, 823 F.2d 466, 469 (11th Cir. 1987);

Recording & Broadcast Ass'n, 414 F.2d 1326 (2d Cir. 1969) (hereinafter cited as *CBS*). Noting that "there is ample authority holding that § 301 gives the federal courts broad jurisdiction to deal with many types of controversies that arise between labor and management," the Second Circuit held that a district court does have jurisdiction to order tripartite arbitration over a jurisdictional dispute between two unions because to do so would be "in line with the overall national policy of furthering industrial peace by resort to agree-upon arbitration procedures." *CBS*, 414 F.2d at 1328 *citing United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. at 577-78.

The Second Circuit found that tripartite arbitration was appropriate in that case because both unions had agreements with a common employer containing broad arbitration provisions covering jurisdictional disputes and the second union had agreed to arbitrate its dispute before an arbitrator who had been chosen in accord with first union's agreement. *CBS*, 414 F.2d at 1329.

Prior to the decision by the Court of Appeals in this case, the Third, Fourth and Seventh Circuits have, at least in *dicta*, endorsed the rationale of *CBS*.[6] The Fourth Circuit affirmed (albeit without opinion) a decision compelling tripartite arbitration over a jurisdictional dispute between two unions. *Baltimore Typographical Union No. 12 v. A. S. Abell Co.*, 588 F.2d

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National Ass'n of Letter Carriers v. United States Postal Service, 590 F.2d 1171, 1174 (D.C. Cir. 1971).

[6] In *Bell Aerospace v. Local 516, United Auto Workers*, 500 F.2d 921, 923 (2d Cir. 1974), the Second Circuit followed its decision in *CBS*. The District of Columbia Circuit recently held in a case involving this same issue, the same parties and essentially the same facts, that under the doctrine of issue preclusion, the decision of Court of Appeals in this case precluded the APWU from relitigating this issue in a different circuit court. *National Post Office Mail Handlers v. American Postal Workers Union*, Nos. 89-5272 & 89-5273 (D.C. Cir. July 3, 1990).

1347 (4th Cir. 1979), *aff'g mem.*, 441 F.Supp. 596 (D. Md. 1977). This district court had relied on *CBS* in ordering tripartite arbitration.

The Seventh Circuit, in *Laborers' International Union v. W. W. Bennett Construction*, 686 F.2d 1267, 1273-74 (7th Cir. 1982), expressly endorsed *CBS* as long as both unions have arbitration agreements with the employer. In *Bennett*, the court actually declined to order tripartite arbitration but only because there was no evidence of an arbitration agreement between one of the two competing unions and the employer. *Id.* at 1276-78. However, the Seventh Circuit specifically noted that the employer could file a new Section 301 action to apply *CBS* if it could allege sufficient facts. *Id.* at 1278.

In *Window Glass Cutters League v. American St. Gobain Corp.*, 428 F.2d 353 (3d Cir. 1970), the Third Circut approved the rationale of *CBS* in *dicta* and dismissed the union's action against the employer seeking bipartite arbitration of a jurisdictional dispute because of the union's failure to join the other interested union under Fed.R.Civ.P. 19 as an additional defendant in the case.

Relying on the Court of Appeals decision here, the Sixth Circuit very recently refused to order tripartite arbitration because there was no contractual nexus between the two unions and the employer. *United Industrial Workers v. Kroger Co.*, 900 F.2d 944, 947 (6th Cir. 1990). In that case, one union sued an employer to compel a bipartite arbitration over the transfer of work by the employer from the members of the first union to the members of a second union. The employer attempted to interplead the second union which did not want to participate in the arbitration. The Sixth Circuit denied the interpleader.

It distinguished the Court of Appeals decision here on the ground that there was no contractual nexus since the employer had not initiated a grievance against the sec-

ond union as their contract specifically required.[7] *Id.* The Sixth Circuit also noted, relying again on the Court of Appeals decision here, that there were procedural obstacles to tripartite arbitration since the two collective bargaining agreements called for different types of arbitration. *Id.* at 947-48.

In addition to these cases, all of the district courts that have been confronted with circumstances similar to *CBS* have compelled tripartite arbitration of the jurisdictional dispute in question: *RCA Corp. v. Local Union 1666, Int'l Bh'd of Electrical Workers,* 633 F.Supp. 1009 (E.D. Pa. 1986); *Local 552, American Broadcasting Co. v. Nat'l Ass'n of Broadcast Employees and Technicians,* 112 L.R.R.M. 2446 (N.D. Cal. 1982); *c.f. United Brick and Clay Workers v. Hydraulic Press Brick Co.,* 371 F.Supp. 818, 825 (E.D. Mo. 1974) (tripartite arbitration ordered between union, former employer and successor employer); *United Steelworkers v. Crane Co.,* 456 F.Supp. 385, 387-89 (W.D. Pa. 1978) (same), *rev'd in part on other grounds,* 605 F.2d 714 (3d Cir. 1979).[8]

II. THIS CASE DOES NOT PRESENT AN IMPORTANT, RECURRING ISSUE OF LABOR LAW.

1. The Petitioner APWU contends that the issue presented by this case is of importance because it "has arisen with some frequency." Pet. p. 20. The Respondent Mail

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[7] Although no formal grievance was filed by the Mail Handlers here, both the Mail Handlers and the Postal Service desired tripartite arbitration. The APWU, which initiated the grievance, did not want tripartite arbitration. In *Kroger,* on the other hand, the second union neither initiated the grievance nor desired tripartite arbitration, and the first union desired only bipartite arbitration.

[8] The only district court decision to deny tripartite arbitration is *Amalgamated Meat Cutters, Local 299 v. Alpha Beta Markets, Inc.,* 96 L.R.R.M. 2509 (S.D. Cal. 1977), which did so because the second union, which the first union sought to join in the arbitration, had no agreement with the employer. Thus, it is consistent with *CBS* and with the Court of Appeals in this case.

Handlers respectfully disagree. Given the frequency with which jurisdictional disputes between competing unions arise and the intensity of the feelings that often accompany those disputes, it is surprising that there has only been a handful of cases in the last 20 years which have addressed this issue. The *CBS* case was decided over 20 years ago. The decision below is only the second time that an appellate court has addressed the issue under the same circumstances– -i.e., where both unions have agreements to arbitrate jurisdictional disputes—since the *CBS* case was decided.[9] In the only other appellate decision, the Fourth Circuit affirmed without an opinion the district court's order compelling tripartite arbitration where both unions requested tripartite arbitration. *Baltimore Typographical Union No. 12 v. A.S. Abell Co.*, 588 F.2d 1349, *aff'g mem.*, 441 F. Supp. 596.

There have been only three other reported district court decisions since the *CBS* decision which address this issue and which were not appealed.[10] In light of the unanimity of the courts on this issue, it is unlikely that many unions, if any at all, will bother to incur the cost of litigating this issue in the future.

The scarcity of cases is not surprising given the fact that there seems to be no dispute that tripartite arbitration is the most efficient, economical and sensible way to resolve jurisdictional disputes between labor unions. *See* Pet. App. 8a. Thus, in the vast majority of cases, either

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[9] As discussed *infra* at pp. 5-7, the Third, Sixth and Seventh Circuits have touched upon the issue, albeit under different circumstances: *Window Glass Cutters League v. American St. Gobain Corp.*, 428 F.2d 353; *United Industrial Workers v. Kroger Co.*, 900 F.2d 944. *Laborers' Int'l Union, Local 309 v. W. W. Bennett Construction Co., Inc.*, 686 F.2d 1267.

[10] *RCA Corp. v. Local Union 1666, Int'l Bh'd of Electrical Workers*, 633 F.Supp. 1009; *Local 552, American Broadcasting Co. v. Nat'l Ass'n of Broadcast Employees and Technicians*, 112 L.R.R.M. 2446; *Amalgamated Meat Cutters Local 299 v. Alpha Beta Markets, Inc.*, 96 L.R.R.M. 2509.

the arbitrator permits intervention by the competing union, the unions voluntarily choose to participate in tripartite arbitration or they devise some other method of private dispute resolution. It is only when one union perceives that it substantially benefits from multiple bipartite arbitrations that the issue is ever litigated.

Given the infrequency with which the issue is litigated and the fact that unions and employers have devised private alternative methods of resolving jurisdictional disputes, the importance of deciding the issue presented by this case is not significant.

2. Even among the parties to this case, there is little likelihood that this issue will recur. It is likely that any future disputes over intervention by the Mail Handlers in APWU arbitrations will be decided by arbitration and will never reach the courts since a binding national arbitration award has now been issued requiring tripartite arbitration under the collective bargaining agreement to which the APWU is signatory.[11] *United States Postal Service and Nat'l Ass'n of Letter Carriers*, USPS Case No. H4N-4J-C 18504 (1989) (Britton, Arb.). The APWU intervened and participated in that arbitration proceeding and therefore should be bound by that arbitration award. Since the APWU is bound by the Britton award, it should be barred from objecting to the Mail Handlers' intervention in future arbitrations over jurisdictional disputes arising under the APWU's collective bargaining agreement.

Although no national postal arbitrator has yet specifically held that the APWU is bound by the Britton award,

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[11] Under the Postal Service collective bargaining agreements, there are binding national arbitration awards and non-binding regional arbitration awards. The arbitration award in this case was a non-binding regional award. By no means are the regional arbitrators in agreement that non-signatory unions are not permitted to intervene in arbitrations over jurisdictional disputes. The regional arbitrators are more or less equally divided on this issue.

there exists a high probability that such an award will issue—unless the APWU concedes the issue—and there will be no need for the courts to further address this issue with regards to the parties herein.[12]

3. This case arises out of the unique circumstances of Postal Service collective bargaining and thus does not present an appropriate vehicle for establishing broad applicable legal principles regarding tripartite arbitration of union jurisdictional disputes. Both the Mail Handlers and the APWU have practically identical collective bargaining agreements with the Postal Service. Pet. App. 2a. Both agreements contain essentially identical arbitration provisions. ER. 119. All three parties are contractually bound by identical substantive rules—R.I.-399—for the determination of work assignments in the Postal Service. Pet. App. 3a. Thus, this case is not typical of jurisdictional dispute cases where the unions are likely to have negotiated very different agreements with inconsistent or even conflicting jurisdictional standards.

In addition, the Mail Handlers have agreed to participate in arbitration proceedings initiated by the APWU. Therefore, there is no dispute among the unions as to procedures that are to apply to the arbitration or as to how the arbitrator is to be chosen. This is not necessarily true in the typical jurisdictional dispute case where the parties may have completely different procedures and methods for arbitrating jurisdictional disputes.

Finally, this lawsuit, itself, is brought under Section 1208(b) of the Postal Reorganization Act, 39 U.S.C. § 1208(b) (hereinafter cited as "Section 1208") and not under Section 301 which applies only to private section labor relations. The two statutes may be similarly worded, but they arise out of different acts of Congress

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[12] In addition, the dispute over tripartite arbitration could be resolved in the upcoming negotiations scheduled to begin in a few months.

and apply to differnt types of employers, i.e. federal sector and private sector. Although similar legal principles are involved, the result may not always be the same under the two different statutes.[13]

III. THE DECISION BELOW WAS CORRECTLY DECIDED.

1. The APWU's argument that the Court of Appeals' decision undermines the principle of the voluntariness of labor contracts and, contrary to forty years of this Court's precedents, reinstates the federal courts as the ultimate authority over labor relations (Pet. 6-22) grossly overstates the facts of this case. The truth is that any infringement upon the voluntariness of contract by the district court's order compelling tripartite arbitration is minimal, at most.

The APWU voluntarily created and invoked the contractual arbitration procedure that led to this lawsuit and has already appeared before the arbitrator selected by the APWU and the Postal Service to hear disputes, including jurisdictional disputes such as the one involved in this case. Pet. App. 3a. The arbitration rules provided for in the APWU-Postal Service collective bargaining agreement will apply at the arbitration hearing. Pet. App. 7a. The identical substantive rules for determination dispute—R.I. 399—are incorporated into both the APWU and the Mail Handlers' collective bargaining agreements with the Postal Service. Pet. App. 3a. All that LIUNA and the Postal Service seek is an order permitting LIUNA to intervene in an APWU-initiated arbitration.[14] Thus, the APWU cannot be heard to com-

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[13] See discussion, *infra* at pp. 15-16.

[14] If this case involved a federal court proceeding rather than an arbitration proceeding, there is no doubt that the Mail Handlers would be permitted to intervene, if not required to do so. *See* Fed.R.Civ.P. 19(a) (compulsory joinder of necessary party), 20(a) (permissive joinder), 24(a)(2) (intervention of right), 24(b)(2)

plain that it has been hailed before an alien forum which it neither contemplated nor bargained for.

As the Court of Appeals stated, the relief sought in this case is, in effect, the consolidation of two consensual bipartite arbitration proceedings over the same dispute into a single tripartite proceeding. Pet. App. 6a. It is true that LIUNA has not formally initiated a grievance over this jurisdictional dispute since it has not yet been aggrieved because the work was initially assigned to its members. However, the fact that it filed both a cross-claim and counterclaim requesting tripartite arbitration is evidence enough that it desires to arbitrate these jurisdictional disputes. Mere procedural technicalities should not stand in the way of effectuating federal labor policy.

2. The APWU's argument which narrowly focuses almost exclusively on the federal labor policy favoring the voluntariness of collective bargaining agreements, not only overlooks other federal labor policies such as that of encouraging the orderly and rapid resolution of labor disputes,[15] but it ignores the federal courts' broad powers under Section 301—and by implication under Section 1208[16]—to fashion a federal common law of collective bargaining agreements to effectuate—and reconcile—these various labor policies.

Section 301 grants authority to the federal courts to enforce collective bargaining agreements. This Court long

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(permissive intervention) and 22(1) (interpleader). *See also Window Glass Cutters League v. American St. Gobain Corp.*, 428 F.2d 353, discussed *supra* at p. 6.

[15] The Supreme Court first recognized this policy in the seminal Steelworkers Trilogy: *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574; *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960).

[16] See fn. 5 *supra*.

ago recognized that Section 301 is not simply procedural, but grants to the federal courts broad authority to fashion appropriate relief that effectuates federal labor policy.

This Court first defined this judicial authority in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957). The Court held that "the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws." 353 U.S. at 456. Most important, *Lincoln Mills* set guidelines for judicial development of the new common law of collective bargaining agreements. The Court noted that although the Labor Management Relations Act expressly provides some substantive law,

> Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem.

Id. at 457.

Given this broad mandate, this Court has carved out exceptions to the usually consensual nature of collective bargaining agreements where those exceptions are necessary to further the federal labor policy encouraging the resolution of labor disputes quickly and finally through private arbitration processes.

For example, in *Int'l Bh'd of Teamsters, Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962), this Court held that where a collective bargaining agreement contains a clause providing for the arbitration of grievances, the courts may imply and enforce against a union an obligation to refrain from striking during the term of the agreement

—even though the union has not agreed to a no-strike clause.[17]

Likewise, in *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, a "successor" employer was required to arbitrate a dispute although it had never signed a collective bargaining agreement with the union. The Court specifically held that a collective bargaining agreement is not "the simple product of a consensual relationship" and that "the impressive policy considerations favoring arbitration are not wholly overborne by the fact that [the successor employer] did not sign the contract being construed." *Id.* at 150. In these decisions, as in *CBS* and its progeny, the courts have interceded in order to aid the private arbitration process.

The APWU's sole reliance on the principle that labor agreements must be voluntary begs the point. The issue is not whether there is a federal labor policy that collective bargaining agreements must be voluntary, but how those agreements should be interpreted and applied in the context of *all* federal labor policies. This Court has repeatedly recognized that a collective bargaining agreement is more than a simple contract. *Transportation-Communication Employees*, 385 U.S. at 160-61; *John Wiley & Sons v. Livingston*, 376 U.S. at 150; *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. at 578-79. Thus, the Court has read and applied collective bargaining agreements not simply by their literal terms but in a manner that effectuates federal labor policy. *Transportation-Communication Employees*, 385 U.S. at 161-62; *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. at 150; *cf. Int'l Bh'd of Teamsters, Local 174 v. Lucas Flour Co.*, 369 U.S. at 104-06.

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[17] The Supreme Court has also held that injunctive relief is available against such a strike despite the Norris-LaGuardia Act, 29 U.S.C. §§ 101 *et seq.*, which prohibits injunctions in labor disputes. *Boys Markets, Inc. v. Retail Clerks, Local 770*, 398 U.S. 235 (1970). The Court reasoned "the Norris-LaGuardia policy of non-intervention should yield to the overall interest in the successful implementation of the arbitration process." *Id.* at 252-53.

Those federal courts which have ordered tripartite arbitration of jurisdictional disputes have relied upon their broad powers under Section 301, finding that tripartite arbitration "is in line with the overall national policy of furthering industrial peace by resort to agreed-upon arbitration procedures." *CBS*, 414 F.2d at 1328. The Court of Appeals below found that tripartite arbitration in this case was "practicable, economical, convenient and fair" and avoids duplication of effort and the possibility of conflicting awards. Pet. App. 8a. The APWU has not even attempted to argue why a process of multiple bipartite arbitration proceedings would effectuate overall federal labor policy or would be reasonable, efficient and fair for all parties concerned.

3. The APWU's argument also ignores the statute sued upon—Section 1208. There is no dispute that Section 1208 is the postal analog of Section 301,[18] but it does not necessarily follow that there are not different policy considerations under the two statutes.

Under Section 301, the courts are to apply "a federal common law" which the courts must "fashion from the policy of our national labor laws." *Textile Workers Union v. Lincoln Mills*, 353 U.S. at 456. In fashioning that federal common law under Section 1208, the courts should look not only to the policies expressed in the Labor Management Relations Act, 29 U.S.C. §§ 141 *et seq.*, but to the specific postal labor policies expressed in the Postal Reorganization Act of 1971, 39 U.S.C. §§ 101 *et seq.*[19]

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[18] See fn. 5, *supra*.

[19] The Postal Reorganization Act gives postal employees the right to engage in collective bargaining regarding wages, hours and conditions of employment and incorporates certain, but not all, provisions of the Labor Management Relations Act. *See* 39 U.S.C. § 1209. In addition, the Postal Reorganization Act contains certain labor provisions which are different than those contained in the Labor Management Relations Act. *See, e.g.*, 39 U.S.C. §§ 1205, 1206 & 1207.

Unlike the Labor Management Relations Act, the Postal Reorganization Act requires mandatory fact finding and arbitration where the parties are unable to reach agreement on a collective bargaining agreement. 39 U.S.C. § 1207.[20] Thus, the Postal Reorganization Act, even more so than the Labor Management Relations Act, expresses a strong policy favoring arbitration of collective bargaining disputes and, in fact, mandates that the parties participate in mediation and arbitration when an agreement is not reached *even though the parties have not voluntarily agreed to do so.*[21]

4. Finally, the fallacy of the APWU's argument is demonstrated by its failure to discuss what is to happen under its theory of the law if conflicting bipartite arbitration awards are issued. In the D.C. Circuit case,[22] the APWU suggested that conflicting arbitration awards could be submitted to the district court which would

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[20] Correspondingly, postal workers are prohibited from striking. 18 U.S.C. § 1918 incorporated into the Postal Reorganization Act by 39 U.S.C. § 410(b)(2).

[21] The APWU argues that federal labor policy is hostile to the resolution of jurisdictional disputes through compulsory tripartite arbitration, as is apparent from the legislative history of Section 10(k) of the Labor Management Relations Act, 29 U.S.C. § 160(k). Pet. 13 n.9. However, the administrative procedures of Section 10(k) for resolving jurisdictional disputes can be activated only when a union violates Section 8(b)(4)(D), 29 U.S.C. § 158(b)(4)(D), which prohibits unions from using strikes, boycotts, threats or coercion to force or require an employer to assign particular work to the members of a particular union. The purpose of Section 8(b)(4)(D) and Section 10(k) is to stop jurisdictional strikes and the economic and social disruption that results from such strikes. *See, NLRB v. Radio and Television Broadcast Engineers Union*, 364 U.S. 573, 580 (1961). However, postal employees are prohibited from striking. 18 U.S.C. § 1918. Therefore, Sections 8(b)(4)(D) and 10(k) do not, in effect, apply to Postal Service labor relations, and their legislative history should have no bearing upon whether courts should order tripartite arbitration under Section 1208.

[22] *National Post Office Mailhandlers v. American Postal Workers Union AFL-CIO*, Nos. 89-5272 & 89-5273, D.C. Cir. (July 3, 1990).

choose which one to enforce. This approach not only favors a wasteful and inefficient method of resolving labor disputes which directly contradicts the federal labor policy favoring their prompt resolution by private arbitration, but it is flatly contrary to this Court's repeated admonitions that the federal courts are not to delve into issues of contract interpretation. *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36 (1987); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. at 596.

A second alternative would be for the court to order an additional tripartite arbitration proceeding. But this approach is not only inefficient and wasteful, it is contrary to the APWU's argument that the courts are without authority to order tripartite arbitration absent an express agreement to submit disputes to tripartite arbitration.

This leaves one final alternative. The courts could simply enforce both arbitration awards against the employer. *See generally, Louisiana-Pacific Corp. v. Int'l Bh'd of Electrical Workers, Local 2294*, 600 F.2d 219 (9th Cir. 1979) (enforcing conflicting arbitration awards where the employer sought judicial relief *after* both arbitration awards had been rendered). Thus, the employer would be required to pay two employees to perform one job for as long as the job exists.[23] Such a result is manifestly unjust, particularly under the facts of this case. Here, the Postal Service has sought judicial relief at the earliest possible time,[24] and all three parties have already agreed to a single set of substantive standards governing work assignments in the Postal Service.

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[23] In *Louisiana-Pacific Corp. v. Int'l Bh'd of Electrical Workers, Local 2294*, 600 F.2d at 220, the jobs in dispute were of limited duration, and thus there was not such a hardship on the employer as there would be when the dispute is over permanent jobs.

[24] The court below limited its *Louisiana-Pacific* decision to the situation where the employer sought relief *after* both arbitration awards had been rendered. Pet. App. 8a.

In the final analysis, this Court has broad authority under Section 301—and by implication under Section 1208—to formulate a common law of collective bargaining agreements which effectuates federal labor policy. *Textile Workers v. Lincoln Mills*, 353 U.S. at 456-57. Although tripartite arbitration may, in some minimal way, infringe upon the absolute voluntariness of the collective bargaining agreement, it is the only reasonable way to effectuate the federal labor policy favoring the prompt resolution of labor disputes by private arbitration. As the Court of Appeals below found, tripartite arbitration is the only "practical, economic, convenient, and fair" method of resolving these disputes while avoiding a duplication of effort and the possibility of conflicting arbitration awards. Pet. App. 8a; *accord. CBS*, 414 F.2d at 329. Thus, it is not surprising that every court that has addressed this issue has endorsed the concept of tripartite arbitration. See discussion *supra* pp. 3-7.

CONCLUSION

For the reason stated herein, the respondent National Postal Mail Handlers Union, a division of the Laborers' International Union of North America, AFL-CIO, hereby prays that the American Postal Worker Union's petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review the decision and judgment in *United States Postal Service v. American Postal Workers Union*, 893 F.2d 1117 (9th Cir. 1990), be denied.

Respectfully submitted,

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No. 89-1953

In the Supreme Court of the United States

OCTOBER TERM, 1990

AMERICAN POSTAL WORKERS UNION, AFL-CIO,
PETITIONER

v.

UNITED STATES POSTAL SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, under Sections 1208(b) and 1209 of the Postal Reorganization Act, 39 U.S.C. 1208(b) and 1209, a federal court may order tripartite arbitration of a jurisdictional dispute between an employer and two unions, both of which have collective bargaining agreements with the employer that provide for arbitration of jurisdictional disputes.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes:

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BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 893 F.2d 1117. The opinion of the district court (Pet. App. 13a-17a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1990. A petition for rehearing was denied on March 15, 1990. Pet. App. 12a. The petition for a writ of certiorari was filed on June 13, 1990. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner American Postal Workers Union (APWU) and respondent National Post Office Mail Handlers, Watchmen and Group Leaders Division of the Laborers' International Union of North America (Mail Handlers) represent employees of respondent United States Postal Service (USPS). Pet. App. 2a. Until 1981, the two unions engaged in joint collective bargaining with USPS under a collective bargaining agreement that permitted either union to intervene in any pending arbitration proceeding involving a dispute over work assignments. *Ibid.* Since 1981, however, petitioner and the Mail Handlers have bargained separately with USPS under similar collective bargaining agreements. Both agreements contain identical, broad arbitration provisions covering jurisdictional disputes, but do not expressly provide for tripartite arbitration. *Id.* at 7a.

The instant controversy arose out of USPS's assignment to the Mail Handlers of certain work at the San Francisco Airport Mail Facility. Pet. App. 3a. Petitioner filed a grievance alleging that a USPS regional instruction binding on all three parties required that the work be assigned to its members. *Ibid.* The APWU-USPS dispute was scheduled for arbitration, and the Mail Handlers then sought to intervene in this arbitration. *Ibid.* While recognizing the Mail Handlers' interest in the matter, the arbitrator concluded that the Mail Handlers could not intervene because the APWU-USPS agreement does not provide for tripartite arbitration. *Ibid.*

2. USPS then brought this action in federal district court in San Francisco against both petitioner and the Mail Handlers, seeking to compel tripartite arbitration. Pet. App. 3a. The parties filed a number

of crossclaims and counterclaims--including the Mail Handlers' request for a permanent injunction requiring tripartite arbitration for any future jurisdictional disputes between the two unions—and then moved for summary judgment. *Ibid.*; see also *id.* at 13a, 17a.

The district court granted USPS's motion for summary judgment, denied petitioner's motion for summary judgment, and denied the Mail Handlers' request for a permanent injunction. Pet. App. 13a-20a. The court noted that Section 1208(b) of the Postal Reorganization Act, 39 U.S.C. 1208(b), "is equivalent" to Section 301 of the Labor-Management Relations Act (LMRA), 29 U.S.C. 185. Pet. App. 14a n.1. The court then observed that under Section 301 —which "gives federal courts broad jurisdiction to handle many types of controversies that arise between labor and management"—"[c]ourts have the power to order performance that is, in literal terms, outside the scope of the collective bargaining agreement." Pet. App. 14a-15a (citing, *inter alia*, *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-579 (1960), and *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 546-551 (1964)). The court further stated that "[p]ursuant to this broad judicial power, courts have frequently ordered tripartite arbitration for jurisdictional labor-management disputes, even absent contractual provisions for such arbitration." Pet. App. 15a (citing cases).

The district court then determined that tripartite arbitration was warranted on the facts of this case. The court stressed that "both collective bargaining agreements have broad, nearly identical arbitration provisions," that any arbitration decision here will "necessarily affect both unions," and that tripartite

arbitration will eliminate the possibility of conflicting awards. Pet. App. 16a. The court also noted that the Mail Handlers agreed to be bound by the procedural provisions of the APWU-USPS arbitration agreement. *Ibid.* Accordingly, the court concluded that "ordering tripartite arbitration in this instance is the fairest and most efficient course of action." *Id.* at 16a-17a. The court declined to issue the permanent injunction requested by the Mail Handlers, however, declaring that "[i]t would be inappropriate to issue such an order without consideration of the particular facts [of a jurisdictional dispute] to determine if tripartite arbitration is warranted." *Id.* at 17a.

3. Petitioner appealed, and the court of appeals affirmed. Pet. App. 1a-11a. After finding that the district court's order compelling arbitration was a final appealable order, *id.* at 3a-4a, the court held that the district court had authority to order tripartite arbitration in this situation. *Id.* at 4a-9a. The court of appeals emphasized that both the APWU-USPS collective bargaining agreement and the Mail Handlers-USPS agreement provide for arbitration of the instant jurisdictional dispute (*id.* at 4a-6a), that the arbitration provisions in both agreements are broad (*id.* at 7a), and that the Mail Handlers agreed to follow the arbitration procedures established by the APWU-USPS agreement. *Ibid.* The court stated that "[c]ompelling all three parties in this case to submit their grievance to the same arbitration is practicable, economical, convenient, and fair" (*id.* at 8a), since "[i]t not only avoids duplication of effort, but also avoids the possibility of conflicting awards." *Ibid.* The court thus concluded that "[i]n light of the trend in federal common law

toward compelling tripartite arbitration under similar circumstances, * * * the district court did not err in ordering the APWU, the Mail Handlers, and the USPS to engage in tripartite arbitration." *Id.* at 8a-9a (citing *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 456-457 (1957)).[1]

ARGUMENT

Petitioner acknowledges that there is no conflict in the circuits, and that a substantial number of federal courts have endorsed the practice of court-ordered tripartite arbitration where all parties have contracted to arbitrate the dispute at issue. Pet. 20-21 & nn.13, 14.[2] Nonetheless, petitioner contends that the Ninth Circuit's holding deserves review by this Court because it rests upon a "fundamental misunderstanding" of this Court's decisions and raises a "critical issue of national labor policy." Pet. 6. The Ninth Circuit's decision, however, reflects no such misunderstanding and raises no issues that demand this Court's attention.

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[1] The court rejected petitioner's contention that the action was out of time under federal and state law. Pet. App. 9a-11a. Petitioner does not seek review of this aspect of the court of appeals' holding.

[2] In addition to the cases cited at Pet. 20 nn.13, 14, see *United Steelworkers* v. *Crane Co.*, 456 F. Supp. 385 (W.D. Pa. 1978), rev'd in part on other grounds, 605 F.2d 714 (3d Cir. 1979), and *Local No. 552, United Brick & Clay Workers* v. *Hydraulic Press Buick Co.*, 371 F. Supp. 818 (S.D. Mo. 1974).

Meat Cutters Local 299 v. *Alpha Beta Markets, Inc.*, 95 L.R.R.M. (BNA) 2509 (S.D. Cal. 1977), cited by petitioner at Pet. 20 n.13, is not to the contrary. One of the competing unions in that case had *no* arbitration clause that encompassed jurisdictional disputes.

1. Petitioner contends that the body of case law upholding authority to order tripartite arbitration should be repudiated by this Court as contrary to the principle that arbitration is purely voluntary. Pet. 6-22. Petitioner's contention that the tripartite arbitration order in this case mandates involuntary arbitration lacks force: as the court of appeals noted, Pet. App. 16a, this case does not involve the imposition of arbitration upon a party that has not agreed to arbitrate. The collective bargaining agreement between each union and the USPS contains an extremely broad grievance-arbitration clause encompassing virtually any kind of labor dispute, including the jurisdictional dispute at issue here. *Id.* at 5a. Moreover, neither collective bargaining agreement expressly precludes tripartite arbitration.

Compelling tripartite arbitration therefore does not require petitioner to arbitrate a dispute that it has not already agreed to arbitrate, or as to which tripartite arbitration is expressly forbidden under its collective bargaining agreement. Instead, compelling tripartite arbitration merely requires the APWU to arbitrate its admittedly arbitrable jurisdictional dispute in a proceeding in which another union participates. Particularly in this case, where the Mail Handlers have agreed to tripartite arbitration pursuant to the procedures found in the APWU-USPS agreement and before the arbitrator chosen by petitioner and the Postal Service, an order compelling tripartite arbitration requires only that petitioner tolerate the Mail Handlers' participation in the proceeding. Such an order can hardly be characterized as making petitioner arbitrate against its will. Indeed, the order is more analogous to a decision that, if arbitration provisions are invoked under two collective agreements

involving the same employer, the two arbitration proceedings may properly be consolidated.[3]

Thus, the courts have generally ordered tripartite arbitration where all parties have consented to arbitrate the type of dispute at issue. For example, in *Columbia Broadcasting Sys., Inc. (CBS)* v. *American Recording & Broadcasting Ass'n*, 414 F.2d 1326, 1329 (1969), the Second Circuit ordered tripartite arbitration of a jurisdictional dispute after observing that the employer and each of the competing unions had entered into a collective bargaining agreement that contained a grievance-arbitration procedure encompassing those disputes. See also Mail Handlers' Br. in Opp. 7 & n.8 (citing district court cases). In contrast, the Seventh Circuit refrained from ordering tripartite arbitration because the collective bargaining agreement of one union contained no arbitration clause of any kind. *Laborers' Int'l Union* v. *W.W. Bennett Constr. Co.*, 686 F.2d 1267 (1982). Finally, in *United Indus. Workers* v. *Kroger Co.*, 900 F.2d 944 (1990), the Sixth Circuit recently declined to grant the employer's request for tripartite arbitration with an unwilling union, reasoning that, even though the union's contract contained an arbitration clause, there was no "duty to engage in separate bipartite arbitration over the subject matter" because

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[3] Moreover, in contrast to a case that might arise in the private sector if each union's contract contained conflicting terms governing the allocation of work, there is no dispute here about the substantive body of law that controls this arbitration. A USPS regional instruction, binding on all parties, controls the assignment of work in this case. See Pet. App. 3a.

no grievance had been filed under that union's contract with the employer. *Id.* at 947.[4]

2. This Court has recognized that arbitration agreements must be applied in light of the priorities of national labor policy. See, *e.g.*, *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543 (1964) (after merger with company having pre-existing collective bargaining agreement, acquiring company is bound by arbitration provisions of that agreement). Thus, petitioner ignores the mandate that federal courts, in interpreting and enforcing collective agreements, should develop a body of federal common law under Section 301 (and Section 1208)[5] that promotes such

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[4] As the Sixth Circuit recognized, 900 F.2d at 947, *Kroger* can be distinguished from the present case because of the absence in *Kroger* of the requisite "contractual nexus" between the employer and the union resisting arbitration. In *Kroger*, the court held that an order for tripartite arbitration was inappropriate because neither of the parties to one of the collective agreements had filed a formal grievance. Moreover, the union that was a party to that collective agreement did not seek arbitration in any form. In this case, although the Mail Handlers did not file a formal grievance, *both* unions expressed willingness to arbitrate the jurisdictional dispute with the employer.

[5] Section 1208(b) of 39 U.S.C. is the "[postal] analogue," *National Ass'n of Letter Carriers* v. *United States Postal Serv.*, 590 F.2d 1171, 1174-1175 (D.C. Cir. 1978), of Section 301 of the LMRA, which authorizes suits by and against labor unions. 29 U.S.C. 185. Accordingly, federal courts apply private sector Section 301 law in resolving suits brought under 39 U.S.C. 1208(b). Pet. App. 4a-5a; *National Ass'n of Letter Carriers* v. *United States Postal Serv.*, 590 F.2d at 1174-1175; *American Postal Workers Union* v. *United States Postal Serv.*, 823 F.2d 466, 469 (11th Cir. 1987); *Columbia Local, American Postal Workers Union* v. *Bolger*, 621 F.2d 615 (4th Cir. 1980); *Melendy* v. *United States Postal Serv.*,

important objectives as the expeditious and orderly resolution of disputes. As this Court has stated in its landmark decision in *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957):

> We conclude that the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws. * * * The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. *Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem.*

Id. at 456-457 (emphasis added). Similarly, in the context of a Postal Service case, the Court has recently stated that "[i]n defining the relationships created by a [collective bargaining] agreement, the Court has applied an evolving federal common law grounded in national labor policy." *Bowen* v. *United States Postal Serv.*, 459 U.S. 212, 224-225 (1983).

In accordance with these principles, and relying in part on cases decided under Section 301(a) of the LMRA, this Court, in *Transportation-Communication Employees Union* v. *Union Pac. R.R.* (*Transportation-Communication Employees*), 385 U.S. 157 (1966), has upheld an order of tripartite arbitration of a jurisdictional dispute under the Railway Labor

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589 F.2d 256 (7th Cir. 1978); see also *Bowen* v. *United States Postal Serv.*, 459 U.S. 212, 232 n.2 (1983) (White, J., concurring in part and dissenting in part).

Act, 45 U.S.C. 151 *et seq.* In that case, the Court stated that a collective bargaining agreement "is not an ordinary contract," but a "generalized code" that calls into being a "new common law." 385 U.S. at 160-161. In interpreting collective bargaining agreements, "particularly * * * for the purpose of settling a jurisdictional dispute over work assignments," it is necessary to "consider the scope of other related collective bargaining agreements, as well as the practice, usage and custom pertaining to all such agreements." *Id.* at 161.

Following this Court's lead in *Transportation-Communication Employees*, the Second Circuit in *CBS*, 414 F.2d at 1329, ordered tripartite arbitration of a jurisdictional dispute between two unions, holding that the order was "in line with the overall national policy furthering industrial peace by resort to agreed-upon arbitration procedures." *Id.* at 1328. Other courts of appeals have endorsed the reasoning and the result in *CBS* as consonant with the federal courts' authority under Section 301. See *Laborers' Int'l Union* v. *W.W. Bennett Constr. Co.*, 686 F.2d 1267 (7th Cir. 1982); *Window Glass Cutters League* v. *American St. Gobain Corp.*, 428 F.2d 353 (3d Cir. 1970).[6]

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[6] As the Mail Handlers observe in their brief in opposition, at 16, a tripartite arbitration order is, if anything, even more appropriate in this case than in a case arising under Section 301. Unlike the LMRA, the Postal Reorganization Act requires mandatory fact finding and arbitration where parties reach an impasse in bargaining. By thus mandating arbitration without the consent of the parties, the Postal Reorganization Act, "even more so than the [LMRA], expresses a strong policy favoring arbitration of collective bargaining disputes." *Ibid.*

In the instant case, as the court of appeals observed, tripartite arbitration "not only avoids duplication of effort, but also avoids the possibility of conflicting awards." Pet. App. 8a. The court below thus properly exercised its authority, in interpreting and enforcing collective agreements, to further the resolution of this jurisdictional dispute in a manner that is "practicable, economical, convenient, and fair." *Ibid.*[7]

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[7] Petitioner also erroneously relies (see Pet. 13 n.9) on the fact that, when the LMRA was enacted in 1947, Congress did not give the National Labor Relations Board the authority to order compulsory arbitration of labor disputes. Rather, Congress defined as an unfair labor practice an attempt by one union to "forc[e] or requir[e]" an employer to assign work to one craft of employees rather than another. 29 U.S.C. 158(b)(4)(D). Upon finding that a strike in violation of this provision has occurred, the NLRB is empowered to settle the jurisdictional dispute. 29 U.S.C. 160(k); *NLRB* v. *Radio Engineers*, 364 U.S. 573 (1961).

Petitioners infer far too much from the legislative history of the LMRA. Congress's paramount concern in 1947 was with coercive labor activities; accordingly, Congress gave the NLRB authority to resolve jurisdictional disputes that generated strikes. The fact that Congress in 1947 did not take the further step of expressly providing for compulsory arbitration by the NLRB in a nonstrike context does not suggest a congressional judgment that *courts* should not use their authority to interpret and enforce collective agreements to aid in resolving jurisdictional disputes arising in that context. Indeed, the statute itself is supportive of alternative means to resolve jurisdictional disputes. See 29 U.S.C. 160(k) (NLRB deprived of jurisdiction if parties agree to resolve dispute in other ways).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1990

U. S. GOVERNMENT PRINTING OFFICE: 1990 262203 20088

(4)

No. 89-1953

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Supreme Court of the United States
OCTOBER TERM, 1990

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v.
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and
NATIONAL POST OFFICE MAIL HANDLERS, WATCHMEN AND GROUP LEADERS DIVISION OF THE LABORERS' INTERNATIONL UNION OF NORTH AMERICA, AFL-CIO,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

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September 12, 1990

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

ARBITRATION CASES

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PETITIONER'S REPLY BRIEF

ARGUMENT

1. Neither of the respondents has persuasively answered petitioner APWU's showing concerning the scope of Section 301. *See* Petition at 6-14.[1] Several arguments made by respondents, however, require brief correction:

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[1] For example, respondent's argument based upon *Int'l Bhd. of Teamsters, Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962), and

First, the Postal Service's argument that "neither collective bargaining agreement expressly *precludes* tripartite arbitration" (Postal Service Br. at 6, emphasis added) is disingenuous, to say the least. The arbitrator's decision (which no party has sought to challenge) held that the APWU's collective bargaining agreement does *not* permit tripartite arbitration.[2] Under well-established principles of Federal labor law, an arbitrator's construction of a collective bargaining agreement, not challenged by any party, is a binding determination of the parties' intent in entering into that agreement, no different from express language in the agreement itself. Thus, no matter how much respondent may try to obscure the fact, the Ninth Circuit's opinion, *does* substitute a court ordered procedure for the one established by the parties themselves, a result entirely inconsistent with the basic premises of Federal labor policy. See Petition at pp. 7-12.

Second, respondents' reliance on the Postal Reorganization Act's authorization of interest arbitration when the parties have reached impasse in negotiations for a new collective bargaining agreement (*see* Postal Service Br. at 10 n.6; Mail Handlers Br. at 16) is entirely irrelevant in the present context, which does not concern such negotiations but rather the resolution of a dispute concerning the parties' contractual rights under an existing collective

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John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964) (*see* Mail Handlers Br. 13-14), are rebutted in the Petition at 11 n.7 and 18-29, respectively. Similarly, respondents' arguments based upon *Transportation-Communication Employees Union v. Union Pacific Railroad Co.*, 385 U.S. 157 (1966) (*see* Mail Handlers Br. at 3-4, 14; Postal Service Br. at 9-10), are rebutted in the Petition at 21 n.15, and were rejected by the court below. *See also Louisiana-Pacific Corp. v. Int'l Bhd. of Electrical Workers*, 600 F.2d 219 (9th Cir. 1979).

[2] The arbitrator ruled that the agreement "cannot be interpreted to require the APWU to permit intervention by the Mail Handlers." R.E. 8.

bargaining agreement.[3] Nothing in the PRA sanctions a court-ordered override of an *existing* collective bargaining agreement that is not permissible under the NLRA and Section 301 of the Taft-Hartley Act.

Third, petitioner has shown that Congress knowingly rejected compulsory tripartite arbitration of jurisdictional disputes. The Mail Handlers' contention that Congress' decision has no application where strikes are prohibited (see Mail Handlers Br. at 16 n.21) mischaracterizes the law. The mandatory resolution of jurisdictional disputes by the National Labor Relations Board may be triggered by a threat of economic coercion, conduct far short of a strike.[4] See Petition at pp. 13-14 n.9.

The Postal Service attempts to sidestep this point by contending that while the National Labor Relations Board may not intervene in jurisdictional disputes absent a threat of economic coercion, the courts may use "their authority to interpret and enforce collective agreement to aid in resolving jurisdictional disputes" where such coercion is absent (Postal Service Br. at 11 n.7). This contention misses the point. The courts may "interpret and enforce" labor agreements. Here, however, the Ninth Circuit, by its own admission, was *not* enforcing the parties' intent but decided to compel *non*-contractual tripartite arbitration.

2. Two recent Court of Appeals decisions reveal conflict between the Courts of Appeals as to the propriety of compelling non-contractual tripartite arbitration. *Na-*

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[3] Indeed, respondents' argument proves too much, because it would justify the courts in compelling arbitration of *any* dispute between unions and employers covered by the PRA, regardless of the existence and scope of any contractual arbitration provision.

[4] Moreover, the NLRB's jurisdictional dispute resolution mechanisms are frequently invoked despite the fact that the National Labor Relations Act prohibits strikes over jurisdictional disputes. 29 U.S.C. § 158(b)(4)(D).

tional Post Office Mail Handlers v. American Postal Workers Union, —— F.2d ——, Nos. 89-5272 and 89-5273 (D.C. Cir. July 3, 1990); *United Industrial Workers v. Kroger Co.*, 900 F.2d 944 (6th Cir. 1990).

The Postal Service has acknowledged that the Sixth Circuit in *Kroger* "held that an order for tripartite arbitration was inappropriate because neither of the parties to one of the collective bargaining agreements had filed a formal grievance." Postal Service Br. at 8 n.4. In *Kroger*, one union had filed a grievance and demanded bipartite arbitration, and the employer responded by demanding a tripartite arbitration procedure that would include another union which had not filed a grievance. The Sixth Circuit affirmed the district court's refusal to compel tripartite arbitration. 900 F.2d at 947.

In contrast to the Ninth Circuit's decision in the instant case, which excused the Mail Handlers' failure to file a grievance by concluding that that union's attempted intervention in the APWU's arbitration was "essentially an invocation of its agreement with the [Postal Service]" (Pet. App. 7a), the Sixth Circuit in *Kroger* held that a "mere request to . . . engage in tripartite arbitration . . . does not constitute such a grievance under the collective bargaining agreement," where (as here) the request for tripartite arbitration does not claim a breach of the collective bargaining agreement. *Kroger*, *supra*, 900 F.2d at 947. The *Kroger* court continued, also contrary to the Ninth Circuit, that to hold that the "failure to file a grievance is irrelevant would essentially rewrite the collective bargaining agreement," which the court may not do under federal labor law. *Id.* at 947.[5]

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[5] The Sixth Circuit emphasized the importance of the grievance procedure, relying upon this Court's conclusions that such a procedure " 'is actually a vehicle by which meaning and content are given to the collective bargaining agreement,' " and is " 'a part of the continuous collective bargaining process.' " *Kroger*, *supra*, 900 F.2d

In short, the Sixth Circuit recognized, as the Ninth Circuit did not, that where, as here, there is no dispute between two of the parties, it would be a complete fiction to view the situation as simply consolidating two existing arbitration proceedings (as in *Columbia Broadcasting Systems, Inc. v. American Recording and Broadcasting Ass'n*, 414 F.2d 1326 (2d Cir. 1969)). As the Sixth Circuit stated in *Kroger*, "even under *CBS*, our power does to extend to forcing parties into types of arbitration that contradict their collective bargaining agreement." *Kroger, supra*, 900 F.2d at 948.[6]

The recent decision of the D.C. Circuit in *National Post Office Mail Handlers, supra*, confirms petitioner's reading of the decision below on these points. In the D.C. Circuit, the plaintiff seeking tripartite arbitration was not the employer, but rather the union representing employees who had been assigned to perform the disputed work—the Mail Handlers. Although the Mail Handlers had filed no grievance, the D.C. Circuit observed that under the reasoning of the Ninth Circuit in this case the absence of a dispute between two of the parties is irrelevant. The D.C. Circuit, therefore, held that the APWU was precluded by the Ninth Circuit's decision in this case from challenging the right of the non-grieving union to bring suit under Section 301, stating:

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at 947 (quoting *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960)).

Although the Sixth Circuit in *Kroger* was not required to reach the question whether the federal courts have the power to compel non-contractual tripartite arbitration where grievances have been filed under both agreements and the party resisting tripartite arbitration has "a duty to engage in separate bipartite arbitration" (*Kroger, supra*, 900 F.2d at 947), that view should be rejected for the reasons stated in the Petition.

[6] This principle applies with particular force where, as here, an arbitrator has already held that only bipartite arbitration is provided by the contract. *See United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987).

> [F]or us to hold that the Mail Handlers Union may not sue for tripartite arbitration, for want of a cause of action, would squarely conflict with the Ninth Circuit's holding that the separate CBAs between the two unions and the USPS together supply "the requisite contractual nexus . . . [because] all of the parties have agreed to the arbitration of the merits" of their jurisdictional grievances under the Postal Reorganization Act. *Id.* at 1120.

National Post Office Mail Handlers, supra, slip op. at 6.

Thus, the Ninth Circuit's decision in the instant case conflicts with the conclusion of the Sixth Circuit in *Kroger* that a "mere request to . . . engage in tripartite arbitration" where there is no claim of a breach of the collective bargaining agreement between two of the parties (*Kroger, supra*, 900 F.2d at 946-947) is not a sufficient basis for a section 301 action to compel tripartite arbitration. On this fundamental issue of section 301 jurisdiction, then, the decisions in the instant case and *Kroger* conflict. That conflict, and the fact that both the decision below and the decision in *Kroger* depart from the principles of *CBS*, has created confusion between the Courts of Appeals which necessitates clarification by this Court.

3. Respondent Mail Handlers has attempted to diminish the importance of this case by claiming that Petitioner APWU "should be bound by" an arbitration decision issued after the decision of the district court in this case. Mail Handlers Br. at 9-10.[7] Petitioner has two brief answers to that contention. First, that case involved a jurisdictional dispute between two other unions[8] and does *not* bind the APWU. The contention that it "should"

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[7] *United States Postal Service and National Association of Letter Carriers*, No. H4N-45-C-18504 (March 16, 1989).

[8] The National Association of Letter Carriers, AFL-CIO and the National Rural Letter Carriers Association.

bind the APWU was expressly rejected by Arbitrator Linda DeLeone Klein in *United States Postal Service and American Postal Workers Union, AFL-CIO*, No. C7C-4R-C 10827 (October 4, 1989).[9] *Cf.*, *W.R. Grace v. Local Union 759, Int'l Union of United Rubber Workers*, 461 U.S. 757 (1983).

Second, the fundamental significance of the case at bar results from the confusion among the Circuits over the authority of Federal courts to order extra-contractual tripartite labor arbitration. That point does not turn on the position of these particular parties in this case or hereafter.

4. Finally, the Mail Handlers' speculation regarding the potential for conflicting arbitration awards (Mail Handlers Br. at 16-17) is a red herring. The existence of two bipartite arbitration procedures is not likely to result in conflicting arbitration awards. The second arbitrator will certainly take into account the decision of the first arbitrator in reaching his or her decision. Any cases in which conflicting arbitration decisions are rendered, which are bound to be exceedingly rare, will most likely result from the employer's conduct in granting the same work to two different unions in two different collec-

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[9] The Arbitrator stated:

> The instant case is distinguishable from the one heard by Arbitrator Britton in that his decision involves the NALC and the Rural Carriers and does not address a history such as the 1973 Memorandum between Postal Service, the APWU and the Mail Handlers. Nor does it address any separate agreement such as the 1983 Memorandum between the Postal Service, the APWU and the Mail Handlers to proceed with tripartite arbitration on only two issues. Although Arbitrator Britton reviewed certain aspects of the bargaining history, the fact is that the bargaining relationship between the NALC and Rural Carriers is different than that between the APWU and the Mail Handlers. Also, Arbitrator Britton relied on Article 15.4.A.9., but this section is not included in the Mail Handlers' contract. . . .

tive bargaining agreements. Where the employer has "sold the store twice," it is hardly in a position to argue the inequity of having to pay for its duplicity. *Cf. Belknap, Inc. v. Hale*, 463 U.S. 491 (1983); *W.R. Grace, supra*, 461 U.S. 757.[10]

CONCLUSION

For the foregoing reasons, and for the reasons discussed in the Petition, the Court should issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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September 12, 1990

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[10] *See also Kroger, supra*, 900 F.2d at 946 (the mere "possibility of external adverse consequences, such as exposure to inconsistent liabilities, cannot abrogate [the employer's] duty" to engage in bipartite arbitration under the collective bargaining agreement).